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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 703

THE BALTIMORE & OHIO RAILROAD COMPANY, PETITIONER,

vs.

RAY BERRY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36,517)

( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

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PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it remembered that, heretofore, to-wit, on the 3rd day of January, 1929, there was filed in the office of the clerk of the Supreme Court of the State of Missouri in a cause entitled Ray Berry, respondent, against The Baltimore & Ohio Railroad Company, a corporation, appellant, No. 29,577, a certified transcript of the judgment of the Circuit Court of the City of St. Louis, and of the order of said circuit court granting an appeal from said judgment to the Supreme Court of Missouri, which said certified copy of said judgment and of said order granting an appeal therefrom is in words and figures following, to-wit:

STATE OF MISSOURI,
City of St. Louis, ss:

Be it remembered, that heretofore, to-wit: at the February Term, Nineteen Hundred and Twenty-eight of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, and on the Twenty-seventh day of February, 1928, it being the Fifteenth day of the February Term, 1928, of said Court, the following proceedings were had in cause No. 113531, Series "B" of the causes in said Court, wherein Ray Berry is plaintiff and The Baltimore & Ohio Railroad Company, a corporation, is defendant; to-wit:

Monday, February 27th, 1928.

113531-B

RAY BERRY,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation

Now at this day this cause coming on for hearing come the parties hereto by their respective attorneys, comes also a jury, to-wit: E. Rollin Barnes, Joseph A. Beebe, Paul L. Caselas, John P. Council, John William Goetz, Randall B. Hall, Louis Heuer, Gustav A. Kremtz, Lewis K. Lamson, Charles W. Laughlin, Neal Mouser, Richard J. Weldon, twelve good and lawful men, duly elected, tried and sworn,

well and truly to try the issues herein joined and a true verdict render according to the law and the evidence. Thereupon, the trial of this cause progressed before the Court, and being terminated, the jurors aforesaid, upon their oaths as aforesaid, say:

"We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined and assess plaintiff's damages at the sum of Thirty Five Thousand Dollars.

P. L. Caselas, Foreman. Randall P. Hall, Charles W. Laughlin, John Wm. Goelz, Neal Mouser, Louis Heuer, Gustave A. Kremtz, Joseph A. Beebe, Rollin Barnes, J. P. Council, Richard J. Weldon."

and the jury being polled, eleven of the jurors as having signed said verdict say they concur therein, but the remaining juror, Lewis K. Lamson, says he does not concur in said verdict.

Wherefore it is considered and adjudged by the Court that plaintiff have and recover of defendant the sum of Thirty-five thousand and no/100 ($35,000.00) Dollars, together with the costs of this suit and have therefor execution.

Verdict and instructions, filed.

And afterwards, to-wit, at the June Term, 1928, of said Court the following further proceedings were had in said cause, to-wit:

Friday, September 14th, 1928.

113531-B

RAY BERRY

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation

Now at this day comes defendant by attorneys and upon motion and for good cause shown the Court doth grant defendant six months additional time within which to file its bill of exceptions. Thereupon, defendant files and presents to the Court its affidavit for an appeal and prays an

appeal to the Supreme Court of Missouri, and also presents to the Court its appeal bond in the sum of $45,000.00 with the United States Fidelity & Guaranty Company as surety, and the Court having seen and examined said affidavit and bond doth order that said bond be approved, which is done, and that an appeal be and the same is hereby allowed the defendant to the Supreme Court of Missouri from the judgment or decision of the Court heretofore rendered herein.

STATE OF MISSOURI,
City of St. Louis, ss:

I, John Schmoll, Clerk of the Circuit Court, City of St. Louis, within and for the City and State aforesaid, certify the above and foregoing to be a full, true and complete transcript of the record entry of the judgment in the above entitled cause, showing the term and day of the term, month and year upon which the same shall have been rendered, together with the order granting the appeal in the above entitled cause, as fully as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 1st day of October, 1928.

John Schmoll, Clerk Circuit Court. (Seal.)

And thereafter and on the 4th day of December, 1930, there was filed appellant's abstract of the record, which said abstract of the record is in words and figures following, to-wit:

IN THE

SUPREME COURT OF MISSOURI,

DIVISION NO. 1.

OCTOBER TERM, 1930
(JANUARY CALL).

RAY BERRY,
(Plaintiff) Respondent,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation,
(Defendant) Appellant.

No. 29,577.

Appeal from the Circuit Court of the City of St. Louis, Mo.,
Honorable H. A. Hamilton, Judge.

APPELLANT'S ABSTRACT OF THE RECORD.

Plaintiff Ray Berry instituted this suit against the defendant, The Baltimore & Ohio Railroad Company, a corporation, on February 11, 1927, by filing his petition in the office of the Clerk of the Circuit Court in the City of St. Louis, Missouri. On May 23, 1927, plaintiff, by leave of Court, amended his petition by

interlineation. Said petition, as amended (caption and signatures omitted), is as follows:

PETITION.

Plaintiff states that defendant now is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of law, engaged in owning and operating a railroad as a common carrier of goods and passengers for hire by railroad, engaged in commerce between the States of Illinois, Indiana, Missouri and the several other states of the United States, and as such in its said business owned, operated, managed and used and was using the hereinafter mentioned engine, cars and railroad equipment, roadbed, trestle and appurtenances, and that defendant does and at all said times was doing business in Missouri and had and now has offices and places of business in the City of St. Louis, Missouri.

Plaintiff further states that on or about the 10th day of February, 1926, plaintiff was in the employ of defendant as a brakeman, and while engaged in his duties as such was upon a train of defendant, moving and traveling in interstate commerce from Illinois to the State of Indiana and transporting goods, freight and material in interstate commerce upon said train, and that plaintiff and defendant were then and there engaged in interstate commerce; and that defendant, by its agents and servants (other than plaintiff) stopped said train near and west of Xenia, Illinois, with the caboose thereof on a trestle having no railings or protective devices whatever thereon to prevent persons falling therefrom, and that the step of said caboose extended out to about the edge of said

trestle, so that a person alighting from said caboose would fall from said trestle down about twenty feet and sustain injuries, and said trestle and situation there as aforesaid was dangerous and not reasonably safe; that plaintiff, in the darkness of the nighttime, not knowing that said caboose was on said trestle, acting pursuant to order, stepped off said caboose there and fell about twenty feet, sustaining the injuries and damage hereinafter alleged; that plaintiff's fall and injuries sustained as aforesaid, directly and proximately, resulted in whole or in part from negligence of defendant, its officers, agents and employes (other than plaintiff), and by reason and as a direct result of defects or insufficiencies due to defendant's negligence in defendant's cars, engines, appliances, machinery, tracks, roadbed, works and other equipment, as follows, to wit:

1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, and they thereby negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid.

2. They negligently caused and permitted said caboose to stop on said trestle as aforesaid, although they knew, or by the exercise of ordinary care would have known, that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe.

3. They negligently caused and permitted said trestle to be and remain without any railings or protective

devices thereon, and without any platform or footway to alight upon from a train or caboose, and without any light or illumination there, whereby the said place, trestle and situation were dangerous and not reasonably safe.

4. They negligently failed to exercise ordinary care to warn plaintiff of the aforesaid conditions and dangers.

5. They negligently failed to exercise ordinary care to discover the aforesaid conditions, situation and dangers before ordering, requiring and permitting plaintiff to alight there as aforesaid.

Plaintiff further states that as a direct and proximate result of the aforesaid negligence and carelessness, his head, limbs and body were bruised and contused, and plaintiff's right leg and hip and the bones, joints, muscles, tendons, tissues, nerves, ligaments, vessels and membranes thereof were severely fractured, broken, wrenched, sprained, bruised, contused, lacerated, swollen, infected and inflamed, and plaintiff sustained severe shock and his nerves and nervous system were severely shocked, and that as a direct result of said injuries plaintiff's right leg and hip are greatly crippled and deformed, his right leg is greatly shortened, to wit, about one and one-half inches, the neck of the femur bone of plaintiff's right leg has become almost completely absorbed and the head of said femur bone is rotated outward, and there has not been complete bone union of the fracture, and there is callus formation thereabout, and that as a direct result of said injuries the function and use of plaintiff's right leg and hip is greatly impaired, diminished and made painful; that plaintiff suffered, is suffering and

will suffer great pain of body and anguish of mind; that all said injuries and effects are serious and permanent, and that plaintiff was and is wholly disabled and lost wages and earnings, to wit, at the rate of about one hundred eighty dollars ($180.00) per month, and will lose further wages and earnings, and was confined to his home for a long period of time and thereafter was required to use crutches, and afterwards a cane to walk with; that plaintiff's right leg and hip are greatly weakened, and said leg and foot turn outwardly, and he is caused to limp, and his ability to walk and get about is seriously and permanently impaired and is painful; that in the care and treatment of said injuries plaintiff expended for and became obligated for medical and surgical services and expenses, to wit, the sum of about two hundred dollars, and will be required to expend further sums for such purposes, and has become obligated for X-ray examinations and pictures, to wit, in the sum of about one hundred dollars ($100.00), and will be required to expend further sums therefor; that plaintiff's ability to engage in his occupation as a brakeman and train employe is wholly destroyed; that plaintiff's ability to engage in an occupation and earn a livelihood is seriously and permanently impaired and diminished, all to plaintiff's injury and damage in the sum of sixty-five thousand dollars ($65,000.00), for which sum, together with his costs, he prays judgment against defendant.

ANSWER.

On August 5th, 1927, at the June Term, 1927, of said court, defendant filed its answer to plaintiff's petition.

On February 27th, 1928, at the February Term,

1928, of said court, defendant filed its amended answer to plaintiff's petition, in words and figures (caption and signatures omitted), as follows:

AMENDED ANSWER TO PLAINTIFF'S PETITION AS AMENDED.

Comes now the defendant in the above-entitled cause, by its attorneys, and for amended answer to plaintiff's petition as amended, filed herein, denies each and every, all and singular, the allegations contained therein.

Wherefore, having fully answered, defendant prays to be hence dismissed, with its costs.

Further answering, and without waiving the general denial set forth above, defendant states that plaintiff herein, in accepting and engaging in the line of his employment, was fully aware of and assumed all the risks, hazards and dangers that were usual, ordinary and incident to the work in which he was engaged.

Wherefore, having fully answered, defendant prays to be hence dismissed, with its costs.

Further answering, and without waiving the general denial set forth above, defendant states that plaintiff herein, in accepting and engaging in the line of his employment, assumed the ordinary risks incident to the performance of such service and all extraordinary risks incident to his employment, which he knew and appreciated, or which would have become apparent to him by ordinary observation, or which were readily discernible to him, and all of which were assumed by him.

Wherefore, having fully answered, defendant prays to be hence dismissed, with its costs.

Further answering, and without waiving the general denial set forth above, defendant states that the injury, if any, complained of by plaintiff was directly due to his own carelessness and negligence directly contributing thereto in this, that he failed to look where he was stepping when he stepped off the caboose referred to in plaintiff's petition, although he knew that there was a trestle in the vicinity of the place where the train and caboose were stopped, and his failure to so look where he was stepping when he stepped off said caboose directly contributed to cause and did cause whatever injury plaintiff may have sustained.

Wherefore, having fully answered, defendant prays to be hence dismissed, with its costs.

Further answering, and without waiving the general denial set forth above, defendant states that the injury, if any, complained of by plaintiff was directly due to his own carelessness and negligence directly contributing thereto in this, that he failed to look where he was stepping when he stepped off the caboose mentioned in plaintiff's petition, and his failure to so look when he stepped off said caboose directly contributed to cause and did cause whatever injury plaintiff may have sustained.

Wherefore, having fully answered, defendant prays to be hence dismissed, with its costs.

REPLY.

On February 27, 1928, at the February Term, 1928, of said court, plaintiff filed his reply to defendant's amended answer, same being a general denial.

TRIAL.

This cause was tried on the issues joined by the pleadings above set out in the Circuit Court of the City of St. Louis, Missouri, on February 27, 1928, at the February Term, 1928, of said court, before Honorable H. A. Hamilton, Judge of said court, presiding in Division No. 13 thereof, and a jury.

VERDICT AND JUDGMENT.

On February 27, 1928, of the said February Term, 1928, of said court, the jury returned a verdict in said cause in favor of plaintiff and against defendant, in the sum of thirty-five thousand dollars ($35,000.00), which verdict was by the Court received, filed and duly entered of record, and thereupon, on the same day, and at the same term of court, the Court rendered and entered of record a judgment in said cause in favor of the plaintiff and against defendant in the sum of thirty-five thousand dollars ($35,000.00).

DEFENDANT'S MOTION FOR NEW TRIAL FILED.

On February 29, 1928, at the February Term, 1928, of said court, and within four days after the trial of said cause and the rendition of said verdict and judgment therein, as aforesaid, defendant filed its motion for a new trial in said cause, the filing of which motion being shown by an entry of record on that date.

DEFENDANT'S MOTION FOR NEW TRIAL OVERRULED.

Thereafter, to wit, on June 25, 1928, at the June Term, 1928, of said court, the Court, by an order duly

made and entered of record on that date, overruled defendant's said motion for a new trial in said cause.

APPEAL GRANTED.

On September 14, 1928, at the June Term, 1928, of said court, defendant filed its affidavit for appeal in said cause, which affidavit was on said date examined and approved by the Court, and defendant on said date was duly allowed an appeal from the verdict and judgment in said cause to the Supreme Court of Missouri.

That on said date, September 14, 1928, at the June Term, 1928, of said court, defendant filed its appeal bond in the sum of forty-five thousand dollars ($45,000.00), with the United States Fidelity and Guaranty Company as surety, which bond was on said date approved by the Court and filed in said cause, all of which being shown by an entry of record on that date.

BILL OF EXCEPTIONS FILED.

On November 6, 1929, at the October Term, 1929, of said court, and within the time allowed by law, defendant's bill of exceptions was duly presented, allowed, approved, signed, sealed, ordered filed and filed in said cause.

All the foregoing actions, orders and proceedings in said cause were duly shown by and properly entered upon the records of said court.

Said bill of exceptions (caption omitted) is as follows:

BILL OF EXCEPTIONS.

Be It Remembered, That at the February Term, A. D. 1928, of said court, and on, to wit, the 27th day of February, A. D. 1928, the above cause came on for trial and was tried in said court before Hon. H. A. Hamilton, one of the Judges of said court, presiding in Division No. 13 thereof, and a jury, and the following proceedings were had:

Appearances:

Mark D. Eagleton, for the plaintiff.
Fordyce, Holliday & White and Kramer, Kramer & Campbell, for the defendant.

Thereupon, a jury having been duly impaneled and sworn to try the issues herein joined, the plaintiff, to to support the issues on his behalf offered and introduced the following evidence:

PLAINTIFF'S EVIDENCE.

RAY BERRY,

being first duly sworn according to law, testified in his own behalf as follows:

Direct Examination, by Mr. Eagleton.

My name is Ray Berry. I am 32. I live at 5746 Helen avenue, St. Louis County. On February 10, 1926, I was in the employ of the B. & O. Railroad Company. Prior to that date I had been in the employ of that company about nine years. On that date

I was injured at about 4:30 a. m. My run at that time was in connection with a freight train, from East St. Louis, Illinois, to Washington, Indiana. That was a regular run of mine at that time. I would make that run every third day.

Mr. Kramer: Defendant at this time wishes to object to the introduction of any evidence under assignment No. 3 of plaintiff's petition or any part of that assignment of negligence in the petition referring to failure to have a rail or any protecting device on the ground that it does not constitute a part of the cause of action.

Mr. Eagleton: That matter was already submitted in a motion to strike out, and the Court in Division No. 1 overruled counsel for defendant.

The Court: I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

Mr. Eagleton (Q.): Your duties at the time of this accident were what, please? A. Flagman. That is practically the same as the brakeman. I had been in the employ of the B. & O. Railroad Company about nine years. At the time of the accident I was earning about $170.00 a month, or approximately $2,000.00 a year. At the time I was injured we were near Xenia. This particular train I left on that night left from East St. Louis, Illinois. Five men, including myself, composed the crew. That would be the engineer and fireman, the conductor, myself and another brakeman. The other brakeman was on the front end of the engine. I was riding in the caboose. That was a freight

train, carrying merchandise. There were about forty-two cars in that train.

Mr. Eagleton: I assume there is no question about the fact, Mr. Kramer, that the B. & O. Railroad Company is a railroad company engaged as a common carrier of freight for hire, and engaged in interstate commerce between various cities?

Mr. Kramer: That is true.

Mr. Eagleton (Q.): Now, at the time you were injured what were you attempting to do? A. To fix a hot box. It was a short distance ahead of the caboose, eight or nine cars, probably. The train was headed east at that time. When we first discovered that a hot box was causing trouble we were about four miles west of Xenia, Illinois. When I first discovered it was there the conductor, Dant, was with me. When it was first discovered that there was a hot box we watched it for a few minutes and then the conductor decided we should stop the train and look at it. I got out on the rear end of the caboose and signaled for the engineer to stop. When we made our first stop on that occasion we were about three miles from Xenia. That would be three miles west, because we were still going east. At the time I got out there at Xenia, the conductor got out with me. After we got out we took a water bucket and went up and looked at this hot box. It was blazing, full of fire; all the oil and waste was on fire. The conductor sent me to the engine to get a bucket of water to put out the fire. When he sent me to the engine to get a bucket of water he gave me other orders or directions.

Q. What were those; tell us?

Mr. Kramer: I object to that as not being in support

of any allegations in the petition and as irrelevant, incompetent and immaterial.

Mr. Eagleton: That was a part of plaintiff's instructions.

The Court: I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

Mr. Eagleton (Q.): What were those orders? A. He told me to tell the engineer that at the next stop, at Xenia, we would finish fixing the hot box. He told me to tell the engineer that the next stop, at Xenia, we would finish fixing the hot box. When I got up to the engineer I conveyed that message to him—gave him that order. I got a bucket of water at the engine and brought it back to the hot box. We poured it on the fire to put it out. We succeeded in getting the fire out. After we got the fire out at this point, three miles of Xenia, we pulled on up to Xenia. When the train next came to a stop the conductor told me to get out and go ahead and fix the hot box, finish fixing it. We moved about three miles from the time the train started, after it had been started, up to the time it stopped again for this next stop. After receiving this last message or order from the conductor I took my lantern and started to get off the caboose, I suppose, to fix it, to go on back up there and finish fixing the hot box, and I walked down the caboose steps, and I thought I was stepping on the ground, and I stepped off into space. I was carrying the lantern in my left hand. It was a small railroad lantern, signal lantern, in other words.

Q. Will you describe the manner in which its rays

were deflected or reflected from this lantern, please?

Mr. Kramer: I object to that question as not being in support of any allegation in the petition, irrelevant, incompetent and immaterial.

The Court: I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

A. The rays from the lantern would shine out in a circle around about the center of the lantern, instead of up and down. The rays would go up to the side and around the middle of the lantern instead of up and down. When I stepped out into this space under the circumstances I mentioned I received a wrenched back. I fell about twenty feet. I received a wrenched and strained back, a broken hip, right hip, and wrenched muscles and ligaments of the right hip and right knee. Prior to the time of this accident the condition of my health was very good. I worked steadily. I had never had any trouble with my right hip or knee before that happened. The rest of the crew, the conductor, engineer and fireman got me out and into the caboose. After they got me to Xenia they called a doctor there who gave me first aid, and then called a Dr. Finch from Flora, and he took me over to Flora, which was my home. At present the right hip is short; I walk with a pretty bad limp. It is sore and painful all the time, night and day, and my knee is painful. It draws and hurts all the time. I walk with a very bad limp, and my foot turns out. I can't throw my leg sideways to get any use of it at all. I have been under the care of a doctor almost constantly since this accident. Dr. Doane has been

attending me for the last year or more. I have had X-rays taken of my right leg and hip. They were taken by Dr. Ernst and Dr. Peden. I was also examined by Dr. Pernoud. I have not received any earnings of any kind whatsoever from the B. & O. Railroad Company since I was hurt. At the time of the accident the night was very dark. I was familiar with the trip from East St. Louis to Washington over a period of a number of years.

Q. Had this train, or any other train, to your knowledge, at any other time in your entire experience, ever stopped with the caboose or any part of it on top of this trestle? A. No, sir.

Mr. Kramer: We object to that as to what any other train did as being incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Eagleton: If the Court please, I don't wish to be captious, but I don't get the basis of the objection or the ruling.

Mr. Hartman: It is incompetent, in the first place, and in the second——

Mr. Eagleton (interrupting): They plead that it was an assumption of risk, that this was the usual and ordinary danger; in other words, I think I have a right to show that. It is absolutely material to prove my case to show that.

Mr. Hartman: A further objection is that it does not tend to prove or disprove anything in this case and is not relevant to any issue in this case.

Mr. Kramer: It doesn't make any difference whether any other train ever stopped there or not.

Mr. Eagleton: It goes to his knowledge as bearing

on the allegation in the answer of contributory negligence. That is absolutely essential to the plaintiff's case.

Mr. Hartman: In other words, whether the train may stop anywhere along the road, where a situation of this kind comes up, which every flagman knows will come up at some time or other, it is up to them to look out for their safety as much as anybody else's, and here is a situation that Mr. Berry says he is thoroughly familiar with by reason of his long period of service over this route.

Mr. Eagleton: I am simply getting at his familiarity with it, which you charge him with in your own answer. If you hadn't plead it, then it would be objectionable, but you have plead it affirmatively.

The Court: The pleading in the answer is that he was familiar with the road and knew that there was a trestle in this vicinity.

Mr. Eagleton: Yes, but his means of knowledge as to where this trestle was, any more than a general knowledge, would be subject to inquiry, and he has already testified that it was dark, and that he didn't see and couldn't see with the means furnished him for that purpose, and now the question is, that goes to contributory negligence and to the assumption of risk.

The Court (after reading defendant's answer): I think, in view of the answer which I had forgotten for the moment, I will reverse the ruling. I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

(Last question read.)

A. No, sir.

Mr. Hartman: We wish to renew our objection to that, and further ask that the answer be stricken out.

The Court: The objection and motion will be overruled.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

Mr. Eagleton (Q.): How long was this particular trestle? A. About 100 feet. It had one track upon it. The trestle was about eight and a half foot or nine wide. The trestle was just as wide as a box car.

Q. Was there any portion, or would any portion, if I was to stop the caboose or box car on that trestle, would any portion of the trestle extend out beyond the sides of the car?

Mr. Hartman: I object to that as calling for a conclusion of the witness and invading the province of the jury.

The Court: If he has observed it he may state it as a fact.

Mr. Eagleton: I will change the form of the question. (Q.) I will ask you, are you familiar with the width of the caboose? A. Yes, sir.

Q. Familiar with the width of box cars? A. Yes, sir.

Q. Familiar with the width of the trestle? A. Yes, sir.

Q. Now, with that familiarity, I will ask you to state whether any portion or part of those objects would extend out beyond the edge of the trestle, or

whether or not the trestle would extend out beyond those objects?

Mr. Hartman: I make the same objection.

The Court: Same ruling; but he will have to state it from his observation, if he has observed them.

To which ruling of the Court defendant, by counsel, then and there excepted and still excepts.

(Last question read.)

A. It would be about the same width as a car or caboose.

(Plaintiff temporarily withdrawn for the purpose of putting the doctors on the stand.)

DR. EDWIN C. ERNST,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Eagleton.

My name is Edwin C. Ernst. I am a physician. I am a graduate of Washington University, class of 1912. Since graduating in medicine I specialized in the taking of X-rays and the diagnosis of X-rays alone. I office in the Bomont Medical Building. I am actively connected with institutions here in St. Louis as X-ray specialist. They are the Bernard Free Skin and Cancer Hospital, St. Louis Mullanphy Hospital and the Marine Hospital. Up to the first of the year I have had occasion to examine or interpret about ninety thousand X-rays. I have some X-rays here of this plaintiff's right leg and hip. This X-ray film, Plaintiff's Exhibit A, is of Mr. Berry, made on January 26, 1927, and indicates the bone structure of

the pelvis, that is, the bones of the hip joint and the thigh bones, and so forth, in the middle portion of the body. The right side along the lower margin of the pelvis at the hip joint, where the lower right leg joins or articulates with the pelvis, there is evidence of a fracture, an old fracture, in which the neck of the femur has been completely absorbed, as is shown by a comparison with the opposite, or left side, and in addition there is a shortening of this leg so that the greater trochanter of the femur is considerably higher on this side than it is over here, or approximately an inch to an inch and a half, at least, higher on the right side, so that his entire leg is shortened to that extent. This other picture is a picture of the left side. That picture shows the normal position or the manner in which the head of the femur and the trochanter and the large bone or femur join. The position, as shown on the right side, is an abnormal position. On this film it just shows the absorption of the areas there; on the other films it shows the line of fracture better. Plaintiff's Exhibit B is a film of the right side alone and is taken stereoscopically, that is, two films are taken, so that by means of a special box or set of boxes you can study the structure of the bones, and you can see the depth of the bones. There are two of these views of the right hip joint taken at different angles for the purpose of comparison and study, and Exhibit B is one of those films and Exhibit C is the other. This shows you practically the same condition, except that between the supposedly area of fracture, the neck being absorbed, you can see there is here a space, probably an inch to an inch and a half long, between the shaft and the head of the femur, and

that being absorbed, you can't see the neck of the femur, possibly, but you can see the place of space where the neck is supposed to be, and the lower half of the neck between the head and the shaft is somewhat translucent, indicating the probability of the union being partly fibrous rather than a complete bony union. When it is a complete bone union it is absolutely white on the film, or completely as dense as a normal bone, or perhaps even denser. This being the head of the femur, this the socket in which this head or acetabulum of the pelvis fits, this being the head here, as I say, as my pencil turns here indicating the outer oval and inner oval of this socket, the shaft should come out in this manner, and then this portion which I am indicating should be down below here. In other words, the space here, this should be taken up by the neck of the femur, and that portion has been, as I said before, absorbed, and this shaft itself has been pushed upward. This one showing the left side is the normal hip joint, and this one of the right side shows the abnormal hip joint. This white space here is approximately an inch and a half below the top of the head of the femur, and on this side (left) it is approximately at the level of the femur. That means that this shaft is pushed upward to approximately the level of this side, where over here it is below this portion we speak of as the neck. When I use the word "absorbed" it means that the structural portion of the bone that gives strength is gone; it is all absorbed. It isn't there any more. The bone that has been absorbed or dissolved in this case is the neck of the femur. I would say the size of the normal neck of the femur is about an inch and a half by one inch;

that would be about from this level here and down to here. About one inch and a half by one inch. Plaintiff's Exhibit C shows the right femur; also shows that the neck has been absorbed, and then it, stereoscopically, does not indicate that this is a complete bony union in the lower half of this space here. The end of the head of the femur comes approximately along this way and over here, and back up to here. Then there is another area of fracture through this portion of the head, which goes to the upper edge. That one goes part of the way up. Stereoscopically, they are comminuted fractures. There are various fractures. You can't follow one clear through. The longest line of the fracture is an irregular course, and it would be longer than the distance in width of the trochanter, I mean the width of the neck of the femur, which is approximately one inch, so it would be probably half again as long, in an irergular course. This picture does not show a complete bony union. This dark line indicates fibrous union there. A fibrous union is for all practical purposes not as good as bony union. There is a great deal of difference. The fibrous union may become very hard. I would probably say it is very much like certain kinds of bony structure, and in the course of years it becomes more or less hardened, but, as a matter of fact, we know from experience that it will never get hardened to the degree of normal bone. It may be fairly strong, but fibrous union is never bony union, and fibrous union always gives. It will become fairly firm, yes, but never as strong as normal bone. A normal union is a bony union. A bony union is as hard as normal bone substance. The only thing I had to do with this case was to take X-rays.

Cross-Examination, by Mr. Kramer.

The absorption of this part here is the neck of the femur. There is a consequent shortening of this man's limb approximately an inch or an inch and a half. There is a union there. The stereoscopic film indicates that the lower half doesn't indicate a bone union, but a fibrous union, and in following through here you can observe the translucency; that is, the darkness on the film is present, where normally it should be even denser than the other portions of the bone because of the usual callus formations that are thrown out at the site of the fracture, and usually that callus formation is so hard that it creates more marked white lines on the film which indicate a greater degree of density in the bone, but in this instance it is cloudy, which shows that there is either no union at all or at least no more than a fibrous union in the lower portion of that. That X-ray picture was taken about a year or a little more ago. I don't know whether it was a year after the accident. It was taken in January, 1927.

Mr. Eagleton then offered in evidence Plaintiff's Exhibits A, B and C, which had just been identified by Dr. Ernst.

DR. JOSEPH C. PEDEN,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Eagleton.

My name is Joseph C. Peden; I am a physician; I am a graduate of St. Louis University, class of 1915.

I have been practicing medicine for the last twelve or thirteen years. I have specialized in X-rays. I am connected with institutions here in St. Louis as X-ray specialist in charge. They are St. John's Hospital, Deaconness Hospital and the Frisco Railroad Hospital. I do work for the Frisco Railroad and St. John's. I had occasion to take some pictures of the plaintiff's right hip, femur and trochanter. I have those pictures with me. Exhibit E is an X-ray examination of Mr. Ray Berry, taken on the 19th day of January, 1928. It shows an old fracture through the neck of the right femur, with absorption of the neck and the stereoscopic view shows this part here, the shaft, is rotated forward in such a way that the broken surfaces of the two fragments are not in their proper position. Instead of being like that, they are turned like that, the shaft behind the head, and it is also displaced upward probably about an inch. The shaft is the main part of the bone that goes down the leg and is called the femur. The femur bone in that picture is displaced upward. It is displaced possibly about an inch, maybe a little more. The left side is here and the right side is here. In addition to the displacement some part is rotated. That rotation is an abnormal condition. It is rotated upward. It is rotated here. Instead of this part here looking towards the side, it looks toward the front. Well, it would only be a sort of a guess as to how much of a rotation is present; I would say probably fifteen or twenty degrees of the circle. Normally the head should be in position with the neck like that. The neck is connected with the shaft; that is, what of it is left. Instead of that shaft being in this position in relation to the neck, it is ro-

tated in such a way that the broken parts are really not in apposition at all. The shaft is behind the head, when it should be sort of to the side of the head. When I speak of the shaft being in the back of the neck I mean the neck of the femur. That neck of the femur also forms the neck of the trochanter; they normally run into each other. That neck has been absorbed. By that I mean it is gone; it had disappeared. The only union we can see is a fibrous union. The film does not show any bony union. In other words, bony union is the only kind of union that is sufficiently hard to give proper support and usure. It is possible to have a fibrous union and still have some use of the limb. If a man was using his leg, walking on it, I would know he would have to have at least a fibrous union there; I would know that as a part of my medical knowledge. The X-ray doesn't show any union present. By union I mean a healing; that is, a permanent healing. By apposition I mean that the broken surfaces should be touching one another. Plaintiff's Exhibit E does not show anything other than the other one; no new condition that calls for any attention. It shows the same condition. I had no further connection with the matter than the taking of these X-rays. There are no other fractures shown in that picture there aside from the one I described or that I have alluded to.

Cross-Examination, by Mr. Kramer.

There are no other fractures shown in any of the pictures I have described.

DR. FRANK K. DOANE,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Eagleton.

My name is Frank K. Doane; I am a physician and surgeon. I am a graduate of the College of Physicians and Surgeons, class of 1905. I have been practicing here in St. Louis twenty-three years. I have, for the last few weeks past, been the plaintiff's attending physician. I have had occasion to examine him and see him frequently. As to his right leg and hip, there is not much I can add to what has been already said by the X-ray men, except that it is not healed; there is no bony union there; in other words, there is no growing together, and it is painful on rotation. That character of injury is a painful injury. I see him about once or twice a week; I have been doing that since last April, I believe.

Cross-examination waived.

DR. F. G. PERNOUD,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Eagleton.

My name is F. G. Pernoud; I am a surgeon. I am a graduate of Washington University, in the year 1907.

Since graduating at Washington University, I have been connected in a surgical capacity with the Barnes Hospital, with the Barnard Free Skin and Cancer Hospital, Alexian Brothers Hospital, Josephine Hospital and the Lutheran Hospital. I have been a medical officer in the United States army; the organizer of the medical department of the Southwestern division of the American Red Cross, and teacher of surgery in Washington University. I had occasion to make some examinations of this plaintiff. The first examination was made January 26, 1927. He came to my office and I made an observation of his method of walking, and then I stripped him of his clothing and made a rather complete examination. I found that he walks with a decided limp favoring his right leg. His right foot is turned in a permanently outward position; that is, with the toes pointing to the right of a line straight ahead. He is unable to bend or flex his right thigh up towards his abdomen. There is an irregularity in the feel about the bones in the neighborhood of the head, neck and great trochanter of the right thigh bone; that is, up near the hip, giving indications of an old fracture of the neck of the right femur. The right leg measures—and I mean by that from a fixed point on the pelvis to the inside of the ankle bone—measures thirty-seven inches. The left leg, in a corresponding measurement, is thirty-eight and one-half inches, showing that the right leg is one and one-half inches shorter than the left. The right trochanter, which is the very tip part of the thigh bone, can be felt. It is oftentimes called the hip bone, and that bone is in a backward position, and the tip of this trochanter points to the rear instead of to the side.

The right knee joint crepitated, and I mean by that it grated on motion. That covers my examination. The trochanter is in a backward position. The entire mechanism of the leg is thrown out of alignment, because the muscles and leaders are so designed against joints in normal alignment that they should work in a certain direction, but when a bone is twisted out of alignment at an important point such as this is, the whole mechanics of the leg are disorganized. That, plus the fibrous union, affects the strength enormously. He is, of course, able to stand on it, but, in so far as exercising or considerable walking, he would be unable to do that. I last saw and examined him February 23, 1928, about a week ago. I believe I recommended pictures be taken; I understood he had had some taken previously, but I wanted to see his condition right down to date. On the second examination I found all of the conditions the same.

Q. Doctor, what is the surgical procedure in a case of this kind where the injury has proceeded over a period of more than two years in the manner that you have described?

Mr. Kramer: I object to that because it has not been shown——

The Court: He may express his opinion on it; that is all he can do.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

Mr. Eagleton: Go ahead, doctor.

(Last question read.)

A. There is surgical procedure that could be attempted to secure union. At the present time there is

no bony union whatever between the ball or head of the femur and the shaft of main bone, and never will be, unless some surgical procedure is attempted. The surgical procedure is one in which a very large incision would be made over the site of the fracture, and the tissues opened and separated down to the point where these bones are broken apart, and then we go in there with a chisel and the assistance of a knife, and all these fibrous tissues which are binding this bone together will have to be cut away. Then with the chisel the broken edges of the broken faces of the bone should be chiseled clean of all scar and fibrous tissue so it is clean bone, and then those two surfaces approximated in as near normal position as possible. It could not be placed back in exactly the normal position because there has been a loss through absorption of a good deal of that bone. Then with a pin or peg which could be cut from the shin bone you would drill a hole through the thigh bone and into the head of this bone, and then this pin or peg cut from the shin bone would be driven into this hole to fix it. That would be the surgical procedure. That character of procedure is advisable because this man has no bony union in that leg, and without bony union the leg is very deficient as a leg, and without bony union unquestionably there will be greater and greater absorption as time goes on of that bone, if it remains in this condition, and the deformity will probably become greater and greater, and as time goes on the pull and stress on this fibrous union will cause it to become longer and longer. In other words, this fibrous tissue will eventually stretch further and further so that in the course of time the joint will be-

come what we call a flail joint; there will be no support there at all. He has no use of that leg for manual labor; he couldn't do anything with it in its present condition. It is my judgment that he could not do work that required standing or walking. It is a most painful injury. Without operative procedure it is a permanent condition. The whole idea of the operation is to secure union between the two broken fragments of bone, and that, in an instance of this kind, is accomplished if the operation is successful, but there are failures to be taken into consideration, too. I am reasonably certain there would be no way of supplying additional bone, so that the amount of shortening would be the same as it is now, or increased, and I mean by that a surgical procedure would increase the present shortening, because an additional small part of the bone would have to be chiseled away in order to make fresh, clean surfaces, so that in so far as the shortening would be concerned it would be more shortened after the operation than it is now, but he would have a firm leg. It would give him greater service, much greater service than his present leg. That is all assuming, of course, that the operation would be a successful procedure. If we were to secure as much as 25 per cent success in operations of this kind we would be fortunate. The reason why greater success is not had is because in a case like this the blood supply has been interfered with—it has been stopped to this part, and after an operation of this character on a bone has been performed it is absolutely essential to have a blood supply in order to build up new bone to form the desired union. If you leave a bone without any blood supply,

or if you leave surfaces like this after operative procedure without a blood supply, the bones would slough away.

Cross-Examination, by Mr. Kramer.

I have testified before in cases where Mr. Eagleton was the attorney representing the plaintiff. I have known Mr. Eagleton, I think, about three years, and in that length of time I have testified approximately twenty to twenty-five times.

RAY BERRY,

being **recalled** to the stand, further testified in his own behalf as follows:

Cross-Examination, by Mr. Kramer.

I have lived in St. Louis about five months. Before that I lived in Flora, Illinois; I lived in Flora all my life up until the time I came to St. Louis. Flora is on the B. & O. Railroad. It is about nine miles from Xenia; it is in the same county. I worked for the B. & O. about nine years before my injury. I was a railroad brakeman all that time with the exception of about ten months when I was with the army during the war. During all that time I worked for the B. & O. on freight trains. I ran over the territory we call the Illinois division; that is, from East St. Louis to Beardstown or Shawneetown. I worked probably an equal amount on the main line that ran from East St. Louis to Washington, Indiana, and the branch. In making this run over the main line from East St. Louis to Washington, Indiana, we were caused to pass through Xenia. I made that run every third day dur-

ing that time. I laid off at Washington, Indiana, and at East St. Louis. We first discovered the hot box about four miles west of Xenia. I discovered it first by the sight of the flames. I was up in the cupola of the caboose when I first saw it. At that time the train was just moving. I called the conductor's attention to it and the train was stopped out on the main line. Then we went and looked at this hot box. We didn't leave anybody back at the rear end. If there was no flagman at the rear end that would be my business to attend to that. We made that stop about three miles from Xenia. We had gone about a mile when we first discovered it until we made this stop. That was on the north side of the train going east. I went to get some water to put the fire out. When I came back the train started and went on until we made this stop where I was hurt. I knew that the train was going to go into this passing track at Xenia. I knew that we had to meet another train there. I had gone into this passage track a number of times. When the train made this stop the caboose was over this bridge or trestle. I was in the cupola of the caboose when the train stopped. The conductor was up there with me. He said to get out and go and finish fixing the hot box. I came down from the cupola first. I put out the fire in the box west of Xenia. I knew it was out because I put it out myself. I knew that our train was going into the passage track there to wait for this passing train when we got to Xenia. I had my lantern with me when I got down off the caboose. The bridge or trestle is just about the width of a box car. It is just about the width of the caboose. I never examined it to see about that being true; I said it was about

that width. That is just about the usual width of all of these trestles on that line. I knew when we made this stop that the head brakeman had to get off and open a switch before we could go into this passage track. I knew we weren't on the passage track when we first made the stop. I got off on the north side. I thought I was stepping on the ground, and when I stepped off the step I found out I wasn't. I dropped about somewhere in the neighborhood of twenty feet. I called the conductor's attention; he knew I was there. He said he would have to get onto the siding at Xenia, and then he said he would get the rest of the crew and come back and help me out. They came back for me with the engine and caboose and I was taken to Xenia. Later Dr. Finch came for me in his automobile. He was the company doctor and had also been my family physician. He treated me after the injury, and I also got Dr. Doane to treat me. Those two were all that treated me. This trestle is about one hundred feet long. I never measured it—that is just my estimate. There were about forty-two cars in this train in addition to the engine and caboose. The length of a freight car is about forty-two feet. The engine with its tender is probably sixty or seventy-five feet, but I don't know as much about engines as I do about cars. The caboose is about forty feet long—between thirty-five and forty—not as long as a freight car.

Redirect Examination, by Mr. Eagleton.

After I had put out the fire in the hot box and after we had started up again the fire did not reappear. In other words, the hot box flared up only the

one time. I put out the fire the first time. After we went on the light didn't flare up again.

Q. From your experience, with the location of that trestle considered, and your previous experience, can you say whether or not you have ever seen an engine with as many as forty-two box cars and a caboose, box cars of the same size, and caboose of the same size, and engine of the same size, pull up to the place where the switch would be to go to get into this passing track that Mr. Kramer refers to, from your experience would that clear this trestle by many car lengths, or not?

Mr. Kramer: I object to that because that is not in support of any allegation in the petition, not in support of plaintiff's case, and it is leading and suggests the answer.

Mr. Hartman: And the further objection that it is not competent, material or relevant to any issue in this case.

The Court: I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

The Witness: What was that question?

(Last question read.)

The Witness: No, sir. I had no experience in that connection.

Plaintiff rests.

Thereupon defendant submitted to the Court in writing and requested the Court to give and read to the jury an instruction in the nature of a demurrer,

which said instruction was in the following words and figures, to wit:

"At the close of the plaintiff's case the Court instructs the jury that under the law and the evidence your verdict must be for the defendant."

Which said instruction the Court, upon a consideration thereof, refused to give and read to the jury at the instance and request of the defendant.

To which action of the Court in so refusing to give and read said instruction to the jury the defendant, by counsel, then and there duly objected and excepted and still objects and excepts.

DEFENDANT'S EVIDENCE.

ALBERT H. WOERNER,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Kramer.

My name is Albert H. Woerner. I live at Washington, Indiana. I am division engineer of the Baltimore & Ohio Railroad, for the St. Louis division. I take charge of the main line from the outskirts of Cincinnati to East St. Louis. That, of course, includes all the territory in Illinois and the territory at and around Xenia, Illinois. I have held that position since January 1, 1925. That has been my position continuously since that time. I have charge of the maintenance of all bridges, trestles, and so forth, in that territory. I was familiar with the roadbed, bridges, trestles, and so forth, before I took my pres-

ent position. After I graduated from college I was with the McClintock Commercial Bridge Company of Pottstown, Pennsylvania, for a time, and then I started in the lower ranks with the Baltimore & Ohio Railroad, and came up through the engineering department. I worked in this territory over here since January 1, 1925; I was east of that before that. I have seen the bridge in question in this suit, a short distance west of the west end of the passing track at Xenia, a good many times. In round figures, that bridge is located about 1,950 feet, maybe a few feet one way or the other, from the west end of the passing track. I have never personally measured it. I have seen this bridge a good many times. This particular bridge is forty-one feet from back wall to back wall. It is about thirty-six feet in the clear between piers. From the track level down to the ground it varies from fourteen and a half feet to eighteen feet at different places. The deck of the bridge, that is, the top, is nine feet wide. It is a little bit longer than the average car if the car was sitting square on the bridge. There is one track on it. I am familiar with the other bridges and trestles on the line of the B. & O. Railroad Company between Washington, Indiana, and East St. Louis, Illinois, as they existed in the month of February, 1926; that is part of my job. There are probably about sixty-five bridges, all told, between Washington, Indiana, and East St. Louis, Illinois, on this railroad. There were between forty-five and fifty bridges similar in character to the bridge in question in this suit on that part of the railroad at that time. There are possibly five or six that have a sidewalk or railing on the side; all the rest of them are without sidewalk or railing. The only place we

have a railing or walkway on a bridge is right close to a switch where the men getting off of the front end of the train to let that train into the siding have to walk right over that to open the switch. We haven't any sidewalk on any bridge that is more than approximately two hundred and fifty or three hundred feet from the switch, and that is the only place where we put them, right where there is a switch right within a few feet. We never put them at a point where the switch is several hundred feet away, because the brakeman who opens the switch to let the train in on the siding gets off of the front end of the train, and not the rear.

Cross-Examination, by Mr. Eagleton.

We put rails and footwalks where they are absolutely needed for the safety of the trainmen. Our policy is not to injure any of them. Whenever our railroad experiences, observations or study tells us there may be a necessity of men using those things we try to have hand rails and foot platforms constructed. We wouldn't put them on every trestle 'way out between stations. This particular bridge we have been speaking about, from which the plaintiff fell or over which the caboose was, according to the testimony, had no hand rail and no walks. I can't tell you anything definite as to a man stepping out of a caboose of the ordinary type, such as was used, would step off into space, practically, if he stepped off while that caboose was on that trestle; I never observed it myself. The bridge is nine feet wide on top. The switch I referred to is the first switch east of that bridge. Going in the direction in which this train

was going, which was east, and continuing away from the trestle, if you measured from the east end of the trestle down to the switch point, it would be 1,950 feet. That switch point leads into the passing track referred to by Mr. Kramer. That is not according to tape-line measure; I went past there and examined the rail, and of course I know what the length of the rails are. I counted the number of rails.

HARRY S. SMITH,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Kramer.

My name is Harry S. Smith. I live at Washington, Indiana. I am trainmaster for the B. & O. Railroad Company, St. Louis division, territory between Seymour, Indiana, and Flora, Illinois. I have had that position since January 1, 1922. Prior to that time I was trainmaster of what is known as the Indiana division, west of Washington, Indiana. I know Ray Berry, the plaintiff in this suit. When he was in the territory between Flora and Washington he was under my direct supervision. I also assign the men to the various crews according to the requirements of the territory they were in west of Washington. I am familiar with the duties of the rear brakeman. I was familiar with those duties during the month of February, 1926. It is the duty of the rear brakeman or flagman to ride the rear car of the train, and it is their duty to protect the train at all times when it is standing on the main track, and at other times it is his duty to assist the members of the crew in per-

forming the duties assigned to them, closing switches, opening switches, setting off cars, picking up cars, fixing hot boxes, and so forth. If a train is out on the main line and is to pass from the main line onto the passing track, as this train in question was doing at the time or intending to do, the head brakeman opens the switch and the flagman or rear brakeman closes it. The head brakeman, of course, opens that switch before the train passes in. He rides on the engine. Then, as the train came along, the head brakeman would either get onto the engine and go to the opposite end of the train, or he would stand there and let the train pull by, and then walk down to the opposite end, unless they had some street crossing that is open. The flagman would close the switch after the rear end of the train passed the clearance point. I made measurements to ascertain the location of this bridge in question where Mr. Berry was hurt from the switch or west end of the passing track. I did that last Saturday. Mr. Morris, the agent at Xenia, Illinois, and Mr. Pritchett, the trainmaster at Flora, were also present. We measured from a point opposite the center of the passenger station to the point of the west switch, and from there to the head wall of the bridge. I found the distance from the point of the west switch to the head wall of the bridge to be 1,945 feet 9 inches. It was 1,983 feet 2 inches from the center of the passenger station to this point of the west switch. The Town of Xenia is east of this bridge. I do not know whether there have been any changes in the switch and bridge since February, 1926. There is nothing to indicate that there had been.

(Cross-examination waived.)

C. C. MORRIS,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Kramer.

My name is C. C. Morris; I live at Xenia, Illinois. I am agent for the B. & O. at Xenia. I have been agent at Xenia a little over fifteen years. I assisted Mr. Smith in making the measurements about which he testified here. The distance from the west end of the switch point to this bridge is 1,945 feet. The distance from the passenger station on the B. & O. in the Town of Xenia, west to the west end of the switch point is 1,983 feet. There are the main line, passenger passing track and house track in the Town of Xenia, Illinois. The passing track is the same one we have been mentioning. The house track extends about a thousand feet west of the passenger station. The corporation line of the Village of Xenia is about 100 feet east of this bridge. The last census showed the population of the Village of Xenia as 640. There has been no material change since the last census.

Cross-Examination, by Mr. Eagleton.

The corporate limits of Xenia, Illinois, are east of the trestle.

A. J. DANT,

being first duly sworn according to law, testified as follows:

Direct Examination, by Mr. Kramer.

My name is A. J. Dant. I live at Washington, Indiana. I am a railroad conductor. I entered the

service of the B. & O. in 1909. I was promoted in 1912 to the position of conductor. I know Ray Berry, the plaintiff in this suit. I was conductor on the freight train on which Ray Berry was working at the time he received his injury. That train ran from East St. Louis to Washington, Indiana. We had 42 cars, engine and caboose. Mr. Berry was my flagman. I know the duties of a flagman. When a train passes into the passing track, as this freight train was at the time, it is the head brakeman's duty to get off and open the switch. He rides on the engine. The flagman didn't have anything to do with opening the switch. He would have to get off and close the switch. I remember the occasion of Mr. Berry's injuries. I remember the occasion of there being a hot box on the train. We first discovered it about four miles west of Xenia. I smelled it. Mr. Berry and I got down out of the cupola and went to the rear end of the caboose or platform, the rear or west end of the caboose, and hung out on the step and looked up and down each side of the train to see if we could locate the hot box. Couldn't see anything at that time. I looked on both sides of the train. I didn't see any hot box blazing. We did not at any time stop the train until we made the stop to go into this passing track. Ray Berry and I did not get off to examine about this hot box before we made this stop at the time he was hurt. He did not at any time go to get water to put the flame out. We did not stop at all after we discovered this hot box until we made the stop to go into the passing track. Mr. Berry, I believe, discovered the hot box first. I immediately smelled it afterwards, and we got down out of the cupola and

walked out on the rear end of the caboose; that is, on the west platform, to see if we could locate it. At that time we had orders that we were to stop and take the siding at Xenia. In taking the siding we went into this passing track we have been talking about. Mr. Berry knew we had those orders. I remember the occasion of the train stopping when we made the stop to go into the passing track. At that time I was riding up in the cupola of the caboose. Berry was in the cupola on the opposite side. At that time I did not say anything to him with reference to the hot box or as to anything that he should do. I did not say anything to him about it while the train was stopped there. I did not know he was going to get off. I saw him get down out of the cupola, and the fact of the matter is that is all I did see him do, because immediately after I saw him get down I looked out of the window on my side to see what kind of a stop we were going to make for the switch. I heard him holler twice after that. After he had fallen off the trestle, of course, he hollered up to me, and I could see that he wasn't unconscious; he could answer me, and I asked him how bad hurt he was, and I also asked him if he was in the water, and he told me no, and I said, "Well, there isn't anything I can do by myself right then because we had to get off the main line," and I told him the best thing to do would be to first put the train on the sidetrack and then cut our engine off and cut off the caboose and come back with it and the engine and pick him up. I says, "I believe that will be the quickest way and the best way out of it," and he says, "I believe I can hold out right where I am until you get back." We did that.

We picked him up and took him to Xenia. The number of our freight train was No. 88. Mr. Berry had been brakeman for me on that train two or three months. When the flagman or rear brakeman get off to close the switch in a case such as this he gets off at the switch as the caboose goes by, and he remains at the switch with the switch open until the train clears the main line, and then he closes the switch.

Cross-Examination, by Mr. Eagleton.

Charlie Schrum was the engineer on our train. He is in court. He is still employed by the B. & O. The engineer on a train of that kind has a headlight on his engine. With the aid of the headlight he can see how close he is to the switch point. At the time we got on up there to this place I did not determine how far the engine stopped back from the switch point. I don't know positively, but from the amount of cars that will fit in between the bridge and the switch point I judge it must have been—oh, say anywhere from a car length and a half to three cars. That is the way I judge it from the size of the cars; I don't positively know. I did not hear the engineer make any statement about being sorry he made such a bad stop. As conductor in charge of the train, I am in charge of the whole crew. My opinion is that the length of that trestle, from east to west, is one car length. If this train had moved to make it clear another car length farther east it would have cleared the trestle. If the caboose had been stopped another car length east to the rear, there would have been a footing there for a man to get off of the caboose. A hot box is one of the things we attempt to get fixed in

order to prevent any further flaring up, or any damage by fire or anything of that kind, and also to prevent accidents, in the sense that if something burns off or burns up the car may turn over, and things of that kind. That is one of the imperative duties to be performed by the flagman or any other member of the crew. The purpose of our going into that siding was to let a westbound train by on the main track. You see, we were going to take the siding and let the train on the main line go through. In other words, we were to meet a train at Xenia, and we were going to get off the track we were on at the time the accident occurred, and the other train was coming through on the main line and continue west. It was while making a clear route on the main-line track that this accident occurred. The train we were to meet hadn't arrived. In this case we would have to wait until the train arrived. That was the orders; to take the siding and wait for the westbound to clear. This westbound train didn't have any definite schedule time to arrive because it was an extra train and extra trains have no time. I judge it was in the neighborhood of about an hour until this train came through.

Redirect Examination, by Mr. Kramer.

I intended to have this hot box fixed after we got into Xenia, after we got in onto this passing track.

Recross-Examination, by Mr. Eagleton.

We were almost there and we would have plenty of time to fix it while we were waiting and, besides, we would be off the main line. I have stopped in the open to examine a hot box, especially when we were a long

way from somewhere. On this occasion we didn't stop when we first discovered the hot box. I wanted to continue in to Xenia and then fix it because we were right close and we were going to take the siding anyway and we would have plenty of time. I did not know we were over the trestle until after we had stopped. I did not know the caboose had stopped on the trestle at the time we stopped. At the time I saw this man get down from the cupola, where he had been with me, I did not know we were on the trestle. I did not say anything to prevent his going out at that time. He did not speak to me about the matter before he left; never said anything. Just he and I were on this car together, and he got up to leave and left me and went down from the cupola and towards the rear of the caboose without saying a word. The next thing I knew he was in the ditch.

Defendant rests.

The above and foregoing was all the evidence offered, introduced or heard at the trial of the above cause.

Thereupon the defendant presented to the Court in writing and requested the Court to give and read to the jury an instruction in the nature of a demurrer, which said instruction was in the following words and figures, to wit:

"At the close of the whole case the Court instructs the jury that, under the law and the evidence, your verdict must be for the defendant."

Which said instruction the Court, upon a considera-

tion thereof, refused to give and read to the jury at the instance and request of the defendant.

To which action and ruling of the Court, in so refusing to give and read said instruction to the jury, defendant, by counsel, then and there duly objected and excepted and still objects and excepts.

Thereupon, at the instance and request of the plaintiff, the Court gave and read to the jury the following instructions numbered 1 and 11, to wit:

PLAINTIFF'S GIVEN INSTRUCTIONS.

Instruction No. 1.

The Court instructs the jury that if you find and believe from the evidence that on the 10th day of February, 1926, the plaintiff was in the employ of defendant as flagman, and while engaged in his duties as such was upon a train of defendant then and there moving and traveling in interstate commerce, from the State of Illinois to the State of Indiana, and transporting goods, freight and material in interstate commerce upon said train, and that plaintiff and defendant were both then and there engaged in interstate commerce, and that the defendant, by its agents and servants (other than the plaintiff) stopped said train near Xenia, Illinois, with the caboose thereof on a trestle, and that the step of said caboose extended out to about the edge of said trestle, so that a person alighting from said caboose would fall from said trestle down about twenty feet and sustain injuries, and that it was dark and in the nighttime; and if you further find that at the time and place where said caboose stopped on said trestle as aforesaid, if you do

so find, plaintiff was in darkness of the nighttime and did not know and had no means of ascertaining, if you do so find, that said caboose was on said trestle, and that thereafter the plaintiff was ordered and directed to alight from said caboose there, and did, pursuant to said order, step off said caboose and fall about twenty feet, sustaining injuries; and if you further find that the defendant, its agents and employes (other than plaintiff), in ordering plaintiff to alight from said caboose there, if you so find, failed to exercise ordinary care, and that said defendant, its agents and employes (other than plaintiff) knew, or by the exercise of ordinary care on their part would have known, of the aforesaid conditions, and that by reason thereof, if you so find, it was dangerous and not reasonably safe; and if you further find that the defendant, its agents and employes did cause and permit said caboose to stop on said trestle as aforesaid, and that they knew, or by the exercise of ordinary care on their part would have known, that by reason thereof it was likely to cause injuries to plaintiff as aforesaid, and that it was dangerous and not reasonably safe, if you do so find; and if you further find that the defendant, its agents and employes (other than plaintiff) were guilty of negligence in stopping said caboose on said trestle as aforesaid, if you so find, and in ordering plaintiff to alight from said caboose under the circumstances aforesaid, if you so find, and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then

your verdict must be in favor of the plaintiff and against the defendant herein.

Instruction No. 11.

The Court instructs the jury that if, under the evidence and the other instructions of the Court, you find in favor of the plaintiff then, in assessing his damages, you will allow him such sum as you believe and find from the evidence will fairly and reasonably compensate him:

First. For such pain and suffering of body and mind, if any, plaintiff has suffered by reason and on account of his injuries, if any, suffered on the occasion in question.

Second. For such pain of body and mind, if any, plaintiff is reasonably certain to suffer in the future by reason and on account of his injuries, if any, suffered on the occasion in question.

Third. For such permanent injuries, if any, plaintiff will suffer by reason and on account of the injuries, if any, sustained on the occasion in question.

Fourth. For such loss of earnings, if any, plaintiff has lost by reason and on account of his injuries, if any, sustained on the occasion in question, not, however, to exceed the sum of $170.00 per month for such loss of earnings, if any.

Fifth. For such future loss of earnings, if any, you find from the evidence plaintiff is reasonably certain to lose in the future by reason and on account of said injuries, if any, suffered on the occasion in question.

To which ruling and action of the Court in giving to the jury each and every one of the above instructions

offered on behalf of the plaintiff defendant, by counsel, then and there duly excepted and still excepts.

Thereupon, at the instance and request of the defendant, the Court gave and read to the jury the following instructions, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, to wit:

DEFENDANT'S GIVEN INSTRUCTIONS.

Instruction No. 2.

You should not consider the question of damages in this case until you have determined whether or not the defendant is liable for the injuries complained of by the plaintiff, and if you find from the evidence that the plaintiff is not entitled to recover, then you will not have occasion to consider at all the character or extent of plaintiff's damages.

Instruction No. 3.

The Court instructs the jury that when the plaintiff was at work at the time in question his conductor had the right to assume that the plaintiff, a man of mature years, was possessed of ordinary mental faculties, the usual powers of observation, and such knowledge as is ordinarily acquired by common experience.

Instruction No. 4.

You are instructed further that if you believe from the evidence the plaintiff knew the risks and hazards of his employment as the business was conducted, and was injured while engaged therein, he cannot maintain an action against the defendant for the injuries

merely on the ground that there was a safer mode in which the business might have been conducted or the work done, the adoption of which would have avoided the injury.

Instruction No. 5.

The Court instructs the jury that an experienced employe, more than 21 years of age, is chargeable with knowledge of the ordinary conditions under which the business in which he is engaged is conducted, and of its ordinary risks and hazards; and he will be presumed to have notice of, and to have assumed all such risks and hazards which, to a person of his experience and understanding are, or ought to be, patent and obvious. And in this case, if you believe from the evidence that the plaintiff was more than 21 years of age, that he was an experienced railroad brakeman, that the happening of the accident in question was one of the ordinary risks and hazards of the business in which the plaintiff was engaged, and that to a person of his experience and understanding such risk was, or ought to have been, patent and obvious, then and in that case the accident in question was one, the risk of which the plaintiff assumed when he engaged in his employment; and for any injuries resulting therefrom the plaintiff is not entitled to recover, and your verdict should be for the defendant, The Baltimore & Ohio Railroad Company.

Instruction No. 6.

You are instructed further that the defendant was not required by law to instruct or give notice to the plaintiff as to risks or dangers which were known to

him, or which were so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them, but the plaintiff must be held by you to have assumed and taken upon himself all such risks or dangers, and if you believe from the evidence that the plaintiff's injury was the result of such risks or dangers, then the Court instructs you that the defendant is not liable for such injury, and your verdict should be for the defendant, The Baltimore & Ohio Railroad Company.

Instruction No. 7.

The Court instructs the jury that even if you believe from the evidence that the trestle in question, at the time in question, was without a railing or other protective device for the use of a person using it, as plaintiff was using it at the time in question, still you are instructed, as a matter of law, that if the evidence shows that the plaintiff knew of such condition of the trestle, or its condition was so obvious that an ordinarily prudent person of plaintiff's experience, under the circumstances, would have observed and appreciated it; then the risk or danger of so using the trestle at the time in question was one which the plaintiff assumed, and he cannot recover, and your verdict should be for the defendant, The Baltimore & Ohio Railroad Company.

Instruction No. 8.

The Court instructs the jury that the plaintiff in using the trestle at the place in question and under the conditions shown by the evidence to have there existed,

was, under the law, bound to take notice of all the conditions about him, affecting his safety, in so far as such conditions would have been noticed or known to a person of his experience, giving ordinary care and attention to his surroundings. The Court further instructs you that the defendant was not required to give the plaintiff any instructions as to dangers or risks that were obvious to him or which he might have seen and understood by exercising such care, caution and attention as would have been exercised by an ordinarily careful person of his experience under the same or similar circumstances. The Court further instructs you that if you believe from the evidence that the injury to the plaintiff was the result of one of the dangers ordinarily incident to the work in which he was engaged, or that the injury was the result of one of the dangers of doing this work in the particular manner in which it was being done, which the plaintiff knew or by the exercise of ordinary care, caution and attention on his part would have known; or, if you believe from the evidence that the injury was the result of a defect or insufficiency in any of the equipment of said trestle, the danger of which the plaintiff knew, or which was so obvious that an ordinarily prudent person of plaintiff's experience under the circumstances would have observed and appreciated it; then the plaintiff assumed the risk of such injury and he cannot recover damages therefor.

Instruction No. 9.

You are instructed further that an employe when he engages in an employment assumes the ordinary risks incident to the performance of such service, and

all extraordinary risks incident to his employment, which said employe knows and appreciates, or which would become apparent to such employe by ordinary observation, or which are readily discernible by him. And if you believe from the evidence that the injury to the plaintiff was the result of one of the ordinary risks incident to the performance of such service as he was then performing; or that such risk was known and appreciated by the plaintiff, or would have become apparent to him by ordinary observation on his part, then he cannot recover and your verdict should be for the defendant, The Baltimore & Ohio Railroad Company.

Instruction No. 10.

The Court instructs the jury that there was no order or direction given to the plaintiff with reference to the work in which he was engaged at the time he received his injury which relieved the plaintiff from the obligation of doing said work at his own risk as to all dangers of which he had knowledge or of which he could have informed himself by the exercise of such care and attention in observing his surroundings, as an ordinarily careful person of his experience and knowledge of the business in which he was then engaged would have exercised under the same or similar circumstances. And if you believe from the evidence that the exercise of such care and attention would have enabled the plaintiff to acquaint himself with the dangers which caused his injuries, then the fact that plaintiff was ordered to do the work in question will be of no importance in this case.

Thereupon the Court, of its own motion, gave and read to the jury the following instruction in the following words and figures, to wit:

INSTRUCTION OF COURT'S OWN MOTION.

Instruction No. 12.

The Court instructs the jury that nine of your number have the power to find and return a verdict, and if less than the whole of your number, but as many as nine, agree upon a verdict, the same should be returned as the verdict of the jury, in which event all of the jurors who concur in such verdict shall sign the same.

If, however, all of the jurors concur in a verdict your foreman alone may sign it.

To which action of the Court in so giving and reading said instruction to the jury of its own motion defendant, by counsel, then and there duly excepted and still excepts.

Defendant also submitted to the Court in writing and requested the Court to give and read to the jury the following instructions, lettered C, D, E, F, G, H, I, J, K, L and M, to wit:

DEFENDANT'S REFUSED INSTRUCTIONS.

Instruction C.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

"1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as afore-

said, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction D.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

"2. They negligently caused and permitted said caboose to stop on said trestle as aforesaid, although they knew, or by the exercise of ordinary care would have known, that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction E.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

"3. They negligently caused and permitted said trestle to be and remain without any railings or protective device thereon, and without any platform or footway to alight upon from a train or caboose, and without any light or illumination there, whereby the said place, trestle and situation were dangerous and not reasonably safe."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction F.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

> "4. They negligently failed to exercise ordinary care to warn plaintiff of the aforesaid conditions and dangers."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction G.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

> "5. They negligently failed to exercise ordinary care to discover the aforesaid conditions, situation and dangers before ordering, requiring and permitting plaintiff to alight there as aforesaid."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction H.

Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

> "That defendant negligently ordered, directed, caused and permitted plaintiff to alight from said

caboose there, causing plaintiff's fall and injuries as aforesaid, although he knew, or by the exercise of ordinary care would have known, of the aforesaid condition and although it was dangerous and not reasonably safe, as aforesaid."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction I.

Among other things, plaintiff charges that the defendant was negligent, in that plaintiff claims:

"That defendant negligently assured plaintiff of safety, although defendant knew, or by the exercise of ordinary care would have known, of the aforesaid condition and although defendant knew that it was dangerous and not reasonably safe, as aforesaid."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction J.

Among other things, plaintiff charges that the defendant was negligent, in that plaintiff claims:

"That defendant negligently caused and permitted said trestle to be and remain without any railings or protective devices thereon, whereby the said place, trestle and situation were dangerous and not reasonably safe."

There is no evidence which under the law warrants you in finding against the defendant under this as-

signment and it is therefore withdrawn from your consideration.

Instruction K.

Among other things, plaintiff charges that the defendant was negligent, in that plaintiff claims:

"That the defendant negligently caused and permitted said trestle to be and remain without any platform or footway to alight upon from a train or caboose, whereby the said place, trestle and situation were dangerous and not reasonably safe."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction L.

Among other things, plaintiff charges that the defendant was negligent, in that plaintiff claims:

"The defendant negligently caused and permitted said trestle to be and remain without any light or illumination there, whereby the said place, trestle and situation were dangerous and not reasonably safe."

There is no evidence which under the law warrants you in finding against the defendant under this assignment and it is therefore withdrawn from your consideration.

Instruction M.

The Court instructs you further that there was no order or direction given to the plaintiff with reference to the work he undertook to do which would relieve him from the duty of observing the nature and char-

acter of the work he was undertaking and of avoiding its usual and ordinary dangers.

Which said instructions, lettered C, D, E, F, G, H, I, J, K, L and M, and each of them, the Court, upon a consideration thereof, refused to give and read to the jury at the instance and request of defendant.

To which action and ruling of the Court in so refusing to give and read said instructions, and each of them, to the jury defendant, by counsel, then and there duly objected and excepted and still objects and excepts.

During the closing argument to the jury Mr. Eagleton, counsel for plaintiff, said, in part, as follows: • • • "After all, gentlemen, if his Honor is wrong in telling you what items you should consider, that is his mistake and not yours. All you have got to do is to go out and follow willingly what his Honor says on the measure of damages. Of course, all the defendant hopes to do is to cut down the damages——

Mr. Hartman (interrupting): We object to that type of argument, criticizing the Court as to the instructions given to these gentlemen of the jury on the measure of damages. That is improper argument, and we move the Court to instruct the jury to disregard that statement of counsel.

The Court: I didn't so understand it. The statement was that if there was anything wrong with the instructions it was my fault and not the jurors'. I will overrule the objection.

To which ruling of the Court defendant, by counsel, then and there duly excepted and still excepts.

Mr. Eagleton: If the Court please, I didn't intend to convey the impression that I considered your Honor

was wrong, and I don't think you gentlemen of the jury so understood me. All I want you to do is to the extent which I have already asked you, and which you promised me you would do when I was examining you on your voir dire, and that is to follow his instructions, and when you follow his Honor's instructions in this case you will bring in a verdict in a substantial figure, such that will compensate this man not only for the four thousand that he has lost; gentlemen, he hasn't begun to lose. He is going to lose from now on. And let me say in that respect, gentlemen, in parting and conclusion, that when you are dealing with the commodity of human life and human anatomy you are dealing with a most precious commodity. You are dealing with something that was given to all of us to be enjoyed to the fullest extent throughout our lives. Born into this world of woman, the image and likeness of our Maker——

Mr. Kramer (interrupting): I object to that as improper argument, no foundation for such argument as that in this record; it is going outside of the record, and we ask that the Court rebuke counsel for making these improper and prejudicial remarks to the jury.

The Court: I will overrule the objection.

To which ruling of the Court the defendant, by counsel, then and there duly objected and excepted and still objects and excepts.

And thereafter and on said 27th day of February, A. D. 1928, at the February Term, 1928, of said court, the jury returned to said Court in said cause their verdict in favor of the plaintiff and against the defendant, which said verdict (omitting the formal caption) was in the following words and figures, to wit:

VERDICT.

We, the jury in the above cause, find in favor of the plaintiff, on the issues herein joined and assess plaintiff's damages at the sum of thirty-five thousand dollars.

(Signed) Paul L. Caselas,
Foreman,

Randall B. Hall,
Charles W. Laughlin,
John Wm. Goelz,
Neal Mouser,
Louis Heuer,
Fustave A. Kremtz,
Joseph A. Beebe,
Rollin Barnes,
J. P. Counsil,
Richard J. Weldon.

Which verdict the Court received from the jury, and the same was, on said 27th day of February, A. D. 1928, at the same February Term, 1928, of said court, duly entered of record in said cause, and the Court thereupon rendered its judgment in favor of plaintiff and against the defendant in accordance therewith.

To which action of the Court in so receiving and filing said verdict, and to the rendition of judgment in accordance therewith, the defendant, by counsel, then and there duly excepted and still excepts.

And thereafter, at said February Term, A. D. 1928, of said court, and within four days after the trial of said cause and the finding and verdict of the jury and the rendition of judgment by the Court in accordance

therewith, and on to wit, the 29th day of February, A. D. 1928, the defendant duly filed in said court in said cause in writing its motion for new trial, which said motion (omitting the formal parts) was in the following words and figures, to wit:

MOTION FOR NEW TRIAL.

Comes now the defendant and moves the Court to set aside the judgment and verdict in this cause and to grant the defendant a new trial for the following reasons, to wit:

I.

Because the Court erred in admitting irrelevant, incompetent, immaterial and prejudicial testimony offered by plaintiff over and against the objection of defendant.

II.

Because the Court erred in excluding material, competent and relevant testimony offered on the part of defendant.

III.

Because the Court erred in refusing and failing to give and read to the jury an instruction in the nature of a demurrer to the evidence offered by defendant at the close of the plaintiff's case.

IV.

Because the Court erred in refusing and failing to give and read to the jury an instruction in the nature of a demurrer to the evidence offered by defendant at the close of the whole case.

V.

Because the Court erred in giving and reading to the jury erroneous, illegal, misleading, improper and prejudicial instructions on behalf of plaintiff, and erred in giving each and every instruction at the request of plaintiff.

VI.

Because the Court erred in refusing to give and read to the jury legal, proper, relevant and necessary instructions asked by defendant.

VII.

Because the Court erred in giving and reading to the jury erroneous, illegal, improper, misleading and prejudicial instructions on its own motion.

VIII.

Because the Court erred in modifying proper, legal and necessary instructions offered by defendant and erred in giving and reading such instructions as modified.

IX.

Because the Court erred in permitting counsel for plaintiff, in argument to the jury, to make improper and prejudicial remarks, over objection and exception of the defendant, and erred in failing and refusing, upon request of the defendant, to instruct the jury to disregard such remarks, and erred in failing and refusing to rebuke counsel therefor, upon request of defendant.

X.

Because the verdict is excessive.

XI.

Because the verdict is excessive and the result of passion and prejudice of the jury.

XII.

Because the verdict is against the evidence and against the weight of the evidence.

XIII.

Because the verdict is against the law and the evidence and the evidence under the law.

And thereafter, at the June Term, A. D. 1928, of said court, and on, to wit, the 25th day of June, A. D. 1928, the Court having considered defendant's motion for new trial, overruled the same.

To which action and ruling of the Court in so overruling said motion for a new trial the defendant, by counsel, then and there duly objected and excepted and still objects and excepts.

And thereafter, on September 14, 1928, and at said June Term, A. D. 1928, the defendant duly filed in said court in said cause its affidavit for an appeal, which affidavit (omitting the formal caption) is in the following words and figures, to wit:

AFFIDAVIT FOR APPEAL.

Comes now E. C. Hartman, of lawful age, being duly sworn, upon his oath states that he is attorney and agent for the defendant in the above-entitled cause, and as such is authorized to make oath, and says that the appeal prayed for in the above-entitled cause is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the Court.

(Signed) E. C. Hartman.

Subscribed and sworn to before me this 28th day of June, A. D. 1928.

(Signed) Madeline G. Kelly,
Notary Public.

My commission expires July 25, 1928.

Thereupon, on said 14th day of September, A. D. 1928, at the said June Term, 1928, of said court, the Court duly allowed defendant an appeal in said cause to the Supreme Court of the State of Missouri.

And now within the time allowed by law for the filing of this bill of exceptions, and inasmuch as the foregoing evidence, proceedings, matters, things, rulings and exceptions do not appear of record, and in order that the same may be made a part of the record in this cause so as to be presented to said Supreme Court, the defendant now presents to the Court this, its bill of exceptions herein, and prays that the same may be settled and allowed, approved, signed, sealed and filed and ordered made a part of the record in

this cause; all of which is accordingly done on this 6th day of November, A. D. 1929.

H. A. Hamilton,
Judge Circuit Court, St. Louis, Missouri, presiding in Division No. 13 at the time of the trial of this cause.

Robt. W. Hall,
Judge Circuit Court, St. Louis, Missouri, presiding in Division No. 13 on this 6th day of November, 1929.

Approved:

Harry M. Stone and
Mark D. Eagleton,
Attorneys for Plaintiff.

Kramer, Kramer & Campbell,
Fordyce, Holliday & White,
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Bill of exceptions filed November 6, 1929.

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And thereafter and on the 15th day of April, 1931, the following proceedings were had and entered of record in said cause, to-wit:

No. 29577

RAY BERRY, Resp.,

vs.

THE BALTIMORE & OHIO RY. CO., App.

Come now the parties, by their respective attorneys, and after argument herein submit this cause to the Court.

And thereafter and on the 5th day of September, 1931, the following further proceedings were had and entered of record in said cause, to-wit:

RAY BERRY, Respondent,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Circuit Court of St. Louis City

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered be affirmed conditionally. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, APRIL TERM, 1931

No. 29577

RAY BERRY, Respondent,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, Appellant

Appeal from the Circuit Court of the City of St. Louis

STURGIS, C.:

Suit for personal injuries by plaintiff, an employee, against defendant, wherein plaintiff recovered, and defend-

ant has appealed. When injured plaintiff was working as rear brakeman or flagman on one of defendant's freight trains engaged in interstate commerce, and it is conceded that this case is governed by the Federal Employers' Liability Act. Plaintiff was injured by attempting to alight from the caboose of defendant's train in the night-time while such caboose was standing on a trestle or open culvert, sometimes called a bridge, over a ravine or creek, and fell some twenty feet to the bottom of such creek or ravine. The train in question was going east from East St. Louis, Illinois, to Washington, Indiana, which was the end of the run, and the accident occurred near Xenia, Illinois, on February 10, 1926.

The facts are few and simple and there is little, if any, controversy except as to the cause of plaintiff's attempt to alight from the caboose at that point. The train was running at night and when some four miles west of Xenia, Illinois, a hot box was discovered on a box car considerably forward from the caboose where the conductor and plaintiff were riding. Plaintiff says that on discovering this hot box, which was blazing, the train was stopped at that point and that he went forward, obtained a bucket of water at the engine, and put out the blaze of the burning hot box, and under instructions from the conductor told the engineer that the hot box would have to be attended to at the next stop at Xenia. The conductor testified that no stop was made there and that no bucket of water was used to put out the blazing hot box, but admits that the hot box was discovered. However this may be, the material fact remains that both the conductor and the plaintiff knew of the hot box and that same would have to receive attention when the train stopped at Xenia. Whether the engineer also knew this fact, we think is not very material. All three of these trainmen also knew that this train had orders to go on the passing track at Xenia, to let a west bound train go by and that to do so it would have to stop just before reaching the switch which the head brakeman riding on the engine would open and let this train in on the passing track. This is what was done and as the train approached the town of Xenia the engineer stopped the engine somewhere from one and one-half to three car lengths from the switch connecting the passing track with the main line. The train consisted of forty-two cars and the engine

and tender—a rather long train—and when it stopped the caboose stood exactly on the bridge or open culvert something over forty feet long and some twenty feet to the ground. The bridge or culvert was just wide enough to carry the track with about the same projection beyond the iron rails as the overhang of the cars and caboose; so that the bottom of the steps leading down from the caboose was about even with the ends of the ties or side of the bridge, and one stepping from those steps as if to the ground would miss the bridge or trestle and would fall to the ground beneath. This is what plaintiff did on this occasion and, as he says, when he stepped from the caboose steps as if to the ground, he stepped into space and landed some twenty feet below.

Plaintiff's excuse for doing this is that when the train stopped he did not know, and in the darkness could not see, that the caboose was on this bridge or open culvert, and that the conductor who was riding with him in the cupola of the caboose ordered him to go fix the hot box. He testified:

"When the train next came to a stop the conductor told me to get out and go ahead and fix the hot box, finish fixing it. We had moved about three miles from the time the train started, after it had been started, up to the time it stopped again for this next stop. After receiving this last message or order from the conductor I took my lantern and started to get off the caboose, I suppose, to fix it, to go on back up there and finish fixing the hot box, and I walked down the caboose steps, and I thought I was stepping on the ground, and I stepped off into space. I was carrying the lantern in my left hand. It was a small railroad lantern, signal lantern, in other words."

It was obvious, therefore, that it was not only dangerous but a certainty of injury for one to step off the caboose into this deep ravine. The conductor denied ordering the plaintiff to alight at this point and testified that nothing was said as to fixing the hot box at that time and that he did not know that plaintiff was intending to get off the caboose at that time; that the stop at that point was merely for the purpose of opening the switch to let the train pass onto the passing track where it would wait for the passing of the other train, and he had no thought of looking after the

hot box until the train was on the side track. The evidence is that it was quite dark at the time and not easy to be seen that the caboose was on this bridge or trestle. It was shown that Xenia was a small town of some six hundred people; that it was nearly two thousand feet from the depot to the point of the switch leading onto the passing track and about two thousand feet further on to the bridge or culvert where plaintiff was hurt, which point was also outside the corporate limits of the town.

The court instructed the jury not to consider the nature or extent of plaintiff's injuries until after first determining defendant's liability, and we will follow that same plan.

Several grounds of negligence are alleged in the petition, but as the case went to the jury on only two of such grounds, we need consider only such two, to-wit, that defendant and its agents and servants (1) negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid, and (2) negligently caused and permitted said caboose to stop on said trestle as aforesaid, although they knew, or by the exercise of ordinary care would have known, that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe. The answer contains a general denial and pleads assumption of the risk causing this injury and also plaintiff's contributory negligence as being the sole cause of his injury.

At the trial the court overruled a demurrer to the evidence asked by the defendant and submitted the case to the jury on instructions covering the two grounds of negligence mentioned. The only instruction given for plaintiff, other than on the measure of damages, in addition to the formal parts and undisputed facts, required the jury to find "that the defendant, by its agents and servants (other than the plaintiff) stopped said train near Xenia, Illinois, with the caboose thereof on a trestle, and that the step of said caboose extended out to about the edge of said trestle, so that a person alighting from said caboose would fall from said trestle down about twenty feet and sustain injuries, and that it was dark and in the night-time; and if

you further find that at the time and place where said caboose stopped on said trestle as aforesaid, if you do so find, plaintiff was in darkness of the night-time and did not know and had no means of ascertaining, if you do so find, that said caboose was on said trestle, and that thereafter the plaintiff was ordered and directed to alight from said caboose there, and did, pursuant to said order, step off said caboose and fall about twenty feet, sustaining injuries; and if you further find that the defendant, its agents and employes (other than plaintiff), in ordering plaintiff to alight from said caboose there, if you so find, failed to exercise ordinary care, and that said defendant, its agents and employes (other than plaintiff) knew, or by the exercise of ordinary care on their part would have known, of the aforesaid conditions, and that by reason thereof, if you so find, it was dangerous and not reasonably safe; and if you further find that the defendant, its agents and employes did cause and permit said caboose to stop on said trestle as aforesaid, and that they knew, or by the exercise of ordinary care on their part would have known, that by reason thereof it was likely to cause injuries to plaintiff as aforesaid, and that it was dangerous and not reasonably safe, if you do so find; and if you further find that the defendant, its agents and employes (other than plaintiff) were guilty of negligence in stopping said caboose on said trestle as aforesaid, if you so find, and in ordering plaintiff to alight from said caboose under the circumstances aforesaid, if you so find, and that plaintiff, while exercising ordinary care for his own safety, if you do so find, was injured as a direct and proximate result of the aforesaid negligence and carelessness on the part of the defendant, its agents and servants (other than plaintiff), then your verdict must be in favor of the plaintiff and against the defendant herein."

The assigned errors of overruling the demurrer to the evidence and of giving this instruction for plaintiff may well be considered together for the reason that if the evidence justifies and supports the giving of this instruction, then there was sufficient evidence to take the case to the jury and the demurrer was rightly overruled.

The defendant insists that the evidence does not justify the submission of the second ground of negligence mentioned, to-wit, that defendant was negligent in stopping its

train so that the caboose stood over this trestle. To this we would agree if such ground of negligence stood alone and constituted a separate and independent ground of negligence on which recovery was predicated. The engineer stopped the train at this point solely to allow the switch to be opened so as to pass his train onto the side track, with the engine at a distance of one and one-half to three car lengths from the switch, and there is nothing to show that this was not the customary, usual and proper place to stop for such purpose. Granting that the engineer knew about where this open trestle was located and that stopping with the caboose on the trestle would make it dangerous for anyone to alight therefrom at such trestle, yet it would take a rather precise calculation, even if he also knew about the length of his train in number of cars, to figure just where the caboose of a forty-two-car train would be standing when the engine was say two car lengths from the switch. Furthermore, the engineer did not know or have reason to know that anyone would or was likely to alight from the caboose at that time and place. The head brakeman, riding on the engine, would alight and go forward to open the switch and the rear brakeman (plaintiff) would not get off till the caboose passed the switch, where he would get off and close such switch. The most that plaintiff claims is that he reported the hot box to the engineer and then told him of the conductor's order to have it attended to at the stop at Xenia; but certainly the engineer would understand this to mean at the stop on the passing track awaiting the passing of the other train. There was nothing to apprise the engineer that plaintiff or anyone would attempt to go forward from the caboose to fix this hot box at this short stop on the main line made only long enough to throw the switch and let the train pass onto the side track where it would stop again.

It will be noted, however, that in the instruction above quoted the two grounds of negligence are connected with the conjunctive "and", so that the jury was required to find both grounds of negligence as a condition precedent to plaintiff's recovery. This mingling of the two was entirely proper as the fact of stopping the caboose on the trestle in question is a constituent element of defendant's negligence in giving a negligent order for plaintiff to alight from

the caboose. After specifying the facts of the two grounds of negligence, the instruction says: "And if you further find that the defendant, its agents and employes were guilty of negligence in stopping said caboose on said trestle as aforesaid, if you so find, and in ordering plaintiff to alight from said caboose under the circumstances aforesaid", and plaintiff was injured as a result of said negligence, to find for plaintiff. The real ground of negligence, therefore, on which plaintiff was allowed to recover was the negligence of the conductor in giving the negligent order to plaintiff to alight at this dangerous place. In order to find that it was negligence for the conductor to order plaintiff to alight from the caboose at this point, it was necessary to find that the caboose was stopped and standing over this trestle or bridge, whether the act of so stopping was itself negligence or not. The word "negligently" might have been omitted from the required finding as to the caboose stopping over this trestle, and the requirement to find that stopping there was negligence could not prejudice the defendant. Requiring the jury to find for plaintiff on two grounds of negligence, when only one of the two is necessary, is not error. It is merely requiring the jury to find negligence as to an unnecessary matter. Seawell v. Railroad, 119 Mo. 222, 241; Foster v. Railroad, 115 Mo. 165, 181. There are other cases more directly in point but this point has not been briefed.

As stated, there were a number of other grounds of negligence alleged, such as that it was negligence to maintain this trestle without a light or passage-way for pedestrians along the side thereof, but these grounds of negligence were abandoned and not submitted to the jury. Error is assigned in that the court refused instructions specifically withdrawing these abandoned grounds of negligence from the consideration of the jury. While these withdrawal instructions might well have been given, and we do not see why they were refused, yet we have held that a refusal of an instruction withdrawing a ground of negligence not submitted to the jury does not constitute reversible error. Dietzman v. St. Louis Screw Co., 300 Mo. 196, 215; Span v. Coal & Mining Co., 322 Mo. 158, 182; Northern v. Chesapeake & Gulf Fisheries Co., 8 S. W. (2d) 982, 996.

The defendant invokes the doctrine of assumption of risk and dangers attendant upon defendant's work as ap-

plied in the federal courts with reference to federal statutes such as are here involved. The only question for consideration here is whether defendant was entitled to a peremptory instruction on this ground. The court gave all the instructions, six in number, asked by defendant on this question, and if it was a jury question at all, the defendant had it presented in a most favorable light. It was conceded that plaintiff was an experienced brakeman and was well acquainted with defendant's tracks and road-bed as well as its equipment and methods of operating its trains, etc. At defendant's instance, the jury was instructed, in substance, that if plaintiff knew of the risks and hazards of his employment as the business was conducted and was injured while engaged therein, he cannot recover for injuries merely on the ground that there was a safer method in which the business might have been conducted; that plaintiff will be presumed to have notice of, and to have assumed all such risks and hazards which to a person of his experience and understanding are, or ought to be, patent and obvious; that if the jury finds that the happening of the accident in question was one of the ordinary risks and hazards of the business in which the plaintiff was engaged, and that to a person of his experience and understanding such risk was, or ought to have been, patent and obvious, then the accident in question was one of the risks which the plaintiff assumed when engaged in his employment; that defendant was not required to instruct or give notice to the plaintiff as to the risks or dangers which were known or obvious to him, but the plaintiff must be held to have assumed all such risks and dangers, and if his injury was the result of such risks and dangers, plaintiff cannot recover; that if the evidence shows that plaintiff knew of the condition of the trestle, or such condition was obvious, then the risk or danger of using the trestle at the time in question was one which the plaintiff assumed, and he cannot recover; that plaintiff was bound to take notice of all the conditions about him, affecting his safety, in so far as such conditions would have been noticed by a person of his experience, giving ordinary care and attention to his surroundings, and defendant was not required to give plaintiff instructions as to such dangers or risks as were obvious to him or might have been discovered by exercising care and caution; that if plaintiff's injury was the result of one of

the dangers ordinarily incident to the work in which he was engaged, or that the injury was the result of one of the dangers of doing this work in the particular manner in which it was being done, or if the injury was the result of a defect or insufficiency in any of the equipment of the trestle, the danger of which plaintiff knew, or which was so obvious that an ordinarily prudent person of his experience would have observed and appreciated it, then plaintiff assumed the risk of such injury and cannot recover; that an employe, when he engages in an employment, assumes the ordinary risks incident to the performance of such service, and all extraordinary risks incident to his employment which said employe knows and appreciates, and if the injury was the result of one of the ordinary risks incident to the performance of such service as plaintiff was performing, or that such risk was known and appreciated by the plaintiff, then he can not recover.

The negligence for which defendant was held liable in this case was the order which the conductor gave to plaintiff to alight from the caboose and go forward to look after the hot box. It would seem obvious that this was not one of the usual and ordinary risks of plaintiff's employment. It was not one of the dangers ordinarily incident to his work which was known to and appreciated by plaintiff. Even if it could be said that plaintiff knew of this particular trestle and others of like nature along defendant's road, making it dangerous to alight from the caboose at such trestle, yet he did not know, and could not have known, that the conductor would order him to alight at such dangerous place. Certainly it was not usual and ordinary for the conductor to do that. Defendant's excuse for not having a guard rail or foot-walk along the side of the trestle, so as to make it safe for pedestrians to be on and pass over this and similar trestles while cars were standing or moving thereon, was that such trestle was not at a place where this was either usual or necessary. It is not necessary for us to say that the doctrine of assumption of risk never applies to the negligent order of the master, obedience to which results in injury to the servant (Huskey v. Heine Safety Boiler Co., 192 Mo. App. 370, 377), but we have no hesitancy in so holding under the facts here.

In Bane v. Irwin, 172 Mo. 306, the plaintiff, engaged in mining, was injured by going close to a lighted but unexploded charge of dynamite, in obedience to his master's order. The court there said:

"The plaintiff did not assume the risk to which he was exposed by the negligent order of his foreman. But plaintiff's evidence tended to prove that the foreman had lighted the third shot but had told the plaintiff he had not done so; that plaintiff left the foreman in the immediate vicinity of the third shot, and that plaintiff had every reason to rely upon what the foreman told him, and that the foreman, without waiting for the shot to explode, ordered plaintiff back into the dangerous place. As said by Judge Sherwood in Sullivan v. Railroad, 107 Mo. l. c. 78, the fact of the presence of the ground foreman and his order to plaintiff was tantamount to an assurance that it was safe for plaintiff to go back into the mine, and plaintiff had a right to rely on the judgment of the foreman that he would perform his duty to him, and especially is it applicable in this case where plaintiff knew there were only three shots prepared and two had exploded. When he received the assurance of the foreman who was last at the shots that he had not fired the third one, it was entirely reasonable for him to act upon the assumption that it was safe to return and fire the shot as directed by the foreman. * * * The two men were not on an equality either in service or opportunity to know the hazard of the undertaking."

It has long been the doctrine in this state that the servant never assumes a risk or danger due to the master's negligence, but under the ruling of the federal courts applicable to the Federal Employers' Liability Act and similar federal statutes, this doctrine has been modified and extended to include dangers and risks due to or growing out of the master's negligence which are fully known to and appreciated by the servant. Martin v. Wabash Ry. Co., 30 S. W. (2d) 735, 742. If this latter doctrine can be applied to negligent orders given by the master and which the servant obeys to his injury, then the danger of obeying such order must be known to and appreciated by the servant or so obvious or plainly observable that it would be presumed to be known to him. As said in West-

over v. Wabash Ry. Co., 6 S. W. (2d) 843, "Respondent assumed the risks and dangers ordinarily incident to his employment, and also the risks caused by his employer's negligence which were fully known to him or so plainly observable that they would be presumed to be known to him. But he was not obliged to use even ordinary care to discover dangerous defects resulting from his employer's negligence. With respect to such a defect, both the defect and the danger to which it gave rise must have been patent. McIntyre v. Railway, 286 Mo. 234, 227 S. W. 1047; Oglesby v. Railway Co., 318 Mo. 79, 1 S. W. (2d) 172; Osborn v. Railway Co., 1 S. W. (2d) 181, 192."

Such is the established rule of the federal courts as shown by Chesapeake and Ohio Railway Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016, where the court said: "According to our decisions, the settled rule is not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

This is much the same doctrine which has always been applied by our courts under the name of contributory negligence, which, with us, defeats plaintiff's action, the doctrine being that the servant is not guilty of contributory negligence in obeying the master's orders unless the danger is so obvious that no ordinarily prudent person would do so; but in the federal courts, where contributory negligence only goes to a diminution of damages, this same doctrine is applied under the name of assumption of risk with the same result. In the present case it is not claimed, or at least was a question for the jury to say, that plaintiff actually knew that the caboose was stopped on this trestle when he was ordered to get off and consequently could not have fully appreciated the danger in attempting to obey the order. Plaintiff did not discover that fact till he fell. Under all the authorities, both state and federal, plaintiff was not required to anticipate that the conductor was send-

ing him into danger by an improvident or premature order, or to investigate the possible danger before obeying the order. This assignment of error must be overruled.

As to plaintiff's contributory negligence in not more closely observing where the caboose was standing or in not looking more carefully where he was alighting therefrom, such negligence on his part, under the federal rule, goes only to a diminution of the damages, and defendant's only contention here is that plaintiff's negligence was the sole cause of his injury; in other words, that defendant was not negligent. This, of course, cannot be true if we hold that it was a jury question of negligence for the conductor to order plaintiff to alight from the caboose at that time and place, and that plaintiff was justified in obeying the order, thereby causing his injury.

The serious question, therefore, is whether the evidence warranted a finding by the jury that the conductor was negligent in giving the order, which the jury found he did give, as to plaintiff alighting from the caboose at this dangerous place. After a careful consideration we have concluded that this was a jury question. In doing so we are mindful that plaintiff was a mature and experienced brakeman, familiar with the road-bed, and that he knew in a general way that there was this open trestle in the vicinity of where the caboose of a long train would stop when about to enter the switch to the passing track. He also knew, as did the conductor and engineer, that this train must make this stop before passing onto the side track and that ordinarily this stop, being on the main line, would be short and only long enough for the head brakeman to open the switch. While plaintiff knew of the hot box, it certainly would be the natural and proper thing to attend to this when the train stopped on the passing track rather than on the main line. All this was known to the conductor also and there is much reason to believe that the conductor would not prematurely order the brakeman to fix the hot box at that place, as the conductor testified, but this was a question for the jury. We might surmise that the conductor only intended to remind the plaintiff of his duty to look after the hot box as soon as the train passed onto the side track which it was then entering, but the conductor made no such explanation but denied that he even mentioned the hot box at that time. The evidence of both the plaintiff and the conductor is set

out in the abstract here in a narrative form and we cannot say that the conductor's order to plaintiff to get out and fix the hot box was not positive and peremptory, requiring immediate obedience. It was the duty of plaintiff to obey the conductor's order unless the order was so palpably unreasonable, and the danger so obvious, that no reasonable person with plaintiff's knowledge and experience would do so under the existing circumstances. Under the doctrine of assumed risk, as we have seen, the plaintiff was not required to anticipate that the conductor would give a negligent order to him, nor was he required to investigate and find out whether he could safely obey such order before doing so. In the absence of positive knowledge to the contrary or of such obvious facts as would impute such knowledge, the plaintiff had a right to rely on the superior authority and knowledge of the conductor and to assume that the conductor would not order him to alight from the caboose unless at a place he could safely do so.

In State ex rel. v. Ellison, 223 S. W. 671, this court had under review an opinion of the Kansas City Court of Appeals. The negligence claimed in that case was that plaintiff's foreman ordered him to climb a defective telegraph pole when he (the foreman) knew, or should have known, it was weak and defective. The Court of Appeals had said:

"Under the foregoing circumstances, if the foreman failed to exercise ordinary care in ascertaining whether the pole was or was not reasonably safe to be climbed, and ordered plaintiff to go up the pole and remove the wires, then there can be no doubt of defendant's liability."

The Court of Appeals had approved an instruction which told the jury:

"If you further believe and find from the evidence that plaintiff went upon such pole in the course of his employment, pursuant to an order or direction of a foreman of the defendant, and that such foreman, in giving plaintiff such order or direction, had authority from defendant to direct and order the plaintiff to go upon said pole as a part of his duties as such employe, and if you further believe and find from the evidence that at the time of such order or direction, if any, the condition of such pole was known, or by the exercise of ordinary care could have been known, to

the defendant or its foreman, then your verdict must be for the plaintiff".

This court approved such rulings.

In Schultheis v. United Railways Co., 236 S. W. 54, the petition charged defendant with negligence "in ordering plaintiff to grab the trolley rope while he was on the step of a car that was in motion and approaching the post". Plaintiff was riding on the footboard of a street car and was injured by striking a post near the track. The court then said:

"Bentz (the foreman) had the implied authority to tell plaintiff to grab it (the rope) as it blew back alongside the car, and, if he did so, it was plaintiff's duty, under such circumstances, to obey the order, although there might not in fact have been any necessity for so doing. * * * The evidence was sufficient, therefore, to have warranted the jury in finding both that the order was negligently given and that it was the proximate cause of plaintiff's injury."

In Herdler v. Buck Stove & Range Co., 136 Mo. 3, plaintiff, a carpenter, was injured by the fall of certain iron columns on which he was ordered to work. The court there made this statement:

"And while it is a general principle that one capable of selecting his employment and contracting for himself is held to assume the risks ordinarily incident to such employment, he does not assume those risks which result from latent defects in machinery or appliances which are unknown to him but which are known to the master or which, by the exercise of ordinary care by the master, should be known to him. * * * Plaintiff did not assume the risk of the negligent bracing of these beams. Defendant was bound to inspect and see that these posts were properly secured before ordering carpenters to go upon them."

In Sullivan v. Railroad, 107 Mo. 66, 76, this is said:

"And having given the plaintiff the original assurance that the staging was safe, the fact that Prather (the foreman) was present and ordered and superintended the removal of the last section of the roof when the accident oc-

curred was tantamount to a tacit assertion that it was safe for plaintiff to proceed with the removal of that section, and plaintiff was not bound to search for danger, but had a right to rely upon the judgment and discretion of the defendant's foreman that he would fully perform the measure of his duty toward him. The plaintiff, indeed, knew to a certain extent of the defect in the tiebeam, but he did not know of the danger to which he was subject by reason of the defect, which Prather did or would have known had he discharged his duty in this regard."

In Schantz v. Northern Pacific Ry. Co., 42 N. D. 377, 173 N. W. 556, suit was brought to recover damages for the death of a section man injured when attempting to board a moving freight train to return from his work, on the order of his foreman. The court held that the negligence of the foreman, in directing or ordering deceased to board the moving train, was for the jury. In discussing this phase of the case the court said:

"It is one of the absolute duties of the master to exercise due care for the safety of his servants. Where it is necessary in the course of the conduct of the business of the master that orders be given to the servants concerning their conduct or the place where they are to work, or to go in pursuit of the master's business, the master has not only a right, but also the absolute power, to give such orders, and the servants have the right to assume that the master has exercised due care in so giving the same."

In Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1, which involved facts similar to the Schantz case, the court said:

"The servant does not stand on the same footing with the master. His primary duty is obedience; and, if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. It is upon this inequality of position that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the master has placed him, and is not bound at his peril to set his own judgment above that of his superior."

In the course of the discussion the court makes the following significant remark:

"By giving a direct command to perform the work, the master takes upon himself the risk which otherwise would be assumed by the servant."

The appellant insists that plaintiff knew the location of this open trestle and the danger of attempting to alight from the caboose thereon equally as well as the conductor and that they were on an equality in that respect, the argument being that if it was negligence in the conductor to order the plaintiff to go forward and look after the hot box, which included alighting from the caboose, then it was also negligence amounting to an assumption of risk for the brakeman (plaintiff) to obey such order. But we do not think plaintiff and the conductor were on an equality in this respect. It was the duty of the conductor in making such an order to use ordinary care to ascertain whether the servant could obey the order in safety, which in this case involved ascertaining whether the caboose stood in a reasonably safe place for plaintiff to alight therefrom. On the other hand, the plaintiff in obeying such order had a right to rely on the conductor having performed this duty and could assume that he could alight in safety at this point, unless he knew to the contrary or the facts were such that such knowledge would be imputed to him.

In Clark v. Iron & Foundry Co., 234 Mo. 436, plaintiff was injured by coming in contact with a live wire on a telegraph pole where he was ordered to work. Speaking of the relative duty of the master and servant in such cases, the court said:

"It is equally academic that this duty of the master was imposed upon its vice-principal, the foreman in charge of the work, and whose orders appellant was obeying in ascending the pole and adjusting the guy ropes. And the foreman's order to the appellant to ascend the pole and do the work designated was an assurance that the place was reasonably safe for that purpose. * * * We are, therefore, of the opinion that the appellant (plaintiff) and respondent (defendant) did not stand on an equal footing regarding the duty to inspect the premises for secret or hidden dangers. That duty clearly rested upon the master,

the respondent in this case, yet the instruction under consideration told the jury that respondent was under no greater duty to inspect the premises than was the appellant. That was clearly an erroneous declaration of the law, and the court erred in so stating it to the jury."

Of course, it was incumbent on plaintiff to use ordinary care for his own safety in carrying out the conductor's order, and so the jury was instructed and found that he did so. In view of the darkness of the night and the small signal lantern carried by plaintiff which alone gave any light, we cannot hold that plaintiff was negligent as a matter of law in this respect, and if we did, it would only be contributory negligence, which does not defeat plaintiff's action. The effect of the conductor's order and plaintiff's duty in carrying out the same is fully covered by defendant's given instruction No. 10.

Other alleged errors have been examined and found without merit. The case was well tried, without reversible error, and should be affirmed unless the verdict for $35,000.00 is excessive.

That plaintiff was seriously and permanently injured is without question, but $35,000.00 is a large verdict. These are the salient facts as to plaintiff's injuries: He was 32 years of age at the time of his injury, his expectancy being 33.9 years, and his earnings near $2000.00 per year. His principal injury was a comminuted fracture of his right hip. The shaft of the femur was driven upward and backward, and the neck of the femur was broken off and finally became absorbed. At the time of the trial a fibrous union of the bones had taken place but there was no bony union and no possibility of one except by a surgical operation of a radical character. The injury was a painful one and up to the time of trial plaintiff had not been able to walk without a bad limp. His foot turned outward and his right leg was one and one-half inches shorter than the other. He was unable to bend or flex his right thigh up towards his abdomen. The entire mechanism of the leg was thrown out of alignment. That, plus the fibrous union, affects the strength very much. Plaintiff was able to stand and walk on his right leg but was not able to do any considerable walking and was not able to follow his usual occupation.

The amount of the verdict at six per cent interest would pay an annual interest in excess of plaintiff's annual earnings and leave the principal intact. All the authorities hold that the total earnings in cases of permanent disability should be reduced to the present worth of such future payments; and plaintiff has not lost his entire earning capacity. In addition to the loss of earnings, the element of pain and suffering must be considered, together with plaintiff's inability to enjoy a normal life. While much latitude must be left to the sound judgment of juries in cases like this, we are constrained to hold that $20,000.00 is all that should be allowed and that the verdict is excessive by $15,000.00.

If, therefore, plaintiff will, within ten days, enter a remittitur of $15,000.00, the judgment will be affirmed in the sum of $20,000.00 and judgment entered for that amount as of the date of the judgment appealed from; otherwise, the case will be reversed and remanded.

John T. Sturgis, Commissioner.

Ferguson, C., concurs.
Hyde, C., concurs.

Per Curiam:

The foregoing opinion by Sturgis, C., is adopted as the opinion of the court. All concur.

And thereafter and on the 11th day of September, 1931, the respondent filed the following remittitur, which said remittitur is in words and figures following, to-wit:

In the Supreme Court of Missouri, Division No. 1, April Term, 1931

No. 29577

Ray Berry, Respondent,

vs.

The Baltimore & Ohio Railroad Company, Appellant

Remittitur

Comes now Ray Berry, the respondent above named, and hereby remits from the judgment rendered in his favor in

the above cause the sum of Fifteen Thousand Dollars ($15,000.00), in accordance with the opinion of this Honorable Court filed herein.

Ray Berry, Respondent (Plaintiff). Mark D. Eagleton, Allen, Moser & Marsalek, Attorneys for Respondent (Plaintiff).

Whereupon and on the 11th day of September, 1931, the following judgment was entered of record in said cause, to-wit:

RAY BERRY, Respondent,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Appellant

Appeal from the Circuit Court of St. Louis City

Now at this day comes the said respondent, by attorney, and hereby enters a remittitur herein in the sum of Fifteen Thousand Dollars part and parcel of the judgment heretofore entered in this cause in the Circuit Court of St. Louis City, in compliance with the order heretofore made by this court on the 5th day of September, 1931. It is therefore considered and adjudged by the court that the judgment aforesaid, by the said Circuit Court of St. Louis City rendered on the 27th day of February, 1928, be affirmed, and stand in full force and effect for the sum of Twenty Thousand Dollars with interest thereon from the 27th day of February, 1928, at the rate of six per cent per annum; and that the said appellant recover against the said respondent its costs and charges therein expended and have therefor execution.

And thereafter and on the 14th day of September, 1931, the following proceedings were had and entered of record in said cause, to-wit:

No. 29577

RAY BERRY, Resp.,

vs.

THE BALTIMORE & OHIO RY. CO., App.

Comes now the appellant, by attorney, and files herein a motion for rehearing.

Which said motion for a rehearing is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, APRIL TERM, 1931

No. 29577

RAY BERRY (Plaintiff), Respondent,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation (Defendant), Appellant

Appeal from the Circuit Court of the City of St. Louis, Mo.

Honorable H. A. Hamilton, Judge

MOTION OF APPELLANT FOR REHEARING

Comes now the Baltimore and Ohio Railroad Company, the appellant in the above-entitled cause, and moves the Court to set aside its opinion and judgment rendered in the above-entitled cause, and to grant to appellant a rehearing in said cause, and for grounds of its said motion states the following:

I

Appellant respectfully submits that the Court erred in holding that the alleged order given by the conductor to respondent to get out and finish fixing the hot box was an extraordinary risk and not an ordinary risk.

II

Appellant respectfully contends that the Court erred in holding that the alleged order given by the conductor relieved the respondent of the duty to investigate the possible danger in obeying the order, and relieved the respondent under the circumstances of the assumption of the risk.

The case is governed by the federal law; and we respectfully submit that no such distinction is made in the law on assumed risk as administered in the federal courts.

In the case of Southern R. Co. v. Logan, 138 Fed. 725 (C. C. A. 4th), a conductor was injured in moving a dining car ahead of the engine; he was instructed by his superior, the yardmaster, to so handle the car, and yet it was held that he assumed the risk.

In the case of Chicago Great Western R. Co. v. Crotty, 141 Fed. 913 (C. C. A. 8th), a brakeman was ordered by the conductor, his superior officer, to move a car by means of a stake and was injured in so doing, and in that case it was held he assumed the risk.

In the case of Union Pac. R. Co. v. Marone, 246 Fed. 916 (C. C. A. 8th), a section man was directed by his foreman to cut a steel rail in a certain way. The section man objected to doing the work without goggles to protect his eyes. He was directed by his foreman to "go on, that's all right, we never use them." And in that case it was held that he assumed the risk.

In the case of Hogan v. B. & O. R. R. Co., 15 Fed. (2) 739 (C. C. A. 6th), a car repairer was required to do certain work repairing cars. He requested that a proper instrument be furnished him. His foreman refused and required him to use a long wrench which was an unsafe appliance. And in that case it was held he assumed th risk.

In the case of Hallstern v. Pennsylvania R. Co., 30 Fed. (2) 594 (C. C. A. 6th), a railroad employe was ordered by his foreman to install an electric light on a coal tipple. Plaintiff demanded a safety belt, but he was ordered by the foreman to proceed without a belt. It was contended on account of the order that the doctrine of assumption of risk was inapplicable. But it was held that the doctrine did apply.

In the case of R. R. Co. v. Jones, 95 U. S. 439, a section foreman and his gang were leaving for home on a train. The plaintiff, a section man, was ordered by the foreman to jump on the train anywhere; that they were behind time and must hurry. The plaintiff, instead of going inside a car, rode on the pilot of the locomotive, and it was held that he could not recover.

In the case of Pryor v. Williams, 254 U. S. 43, the plaintiff was engaged in tearing down a bridge. He was ordered by his foreman to use a defective claw bar. He contended that in obeying the order of the foreman he did not pause to make an inspection, but used the tool without any but a casual inspection which did not reveal the defect. And in that case it was held that the doctrine of assumption of risk did apply.

We respectfully submit that this case does not involve an assurance of safety. It does not involve a situation where the conductor, by his experience, training, education, etc., had a knowledge superior to that of respondent, and that the distinction made by the Court in this case is not made in the federal courts.

III

Appellant respectfully asks that a rehearing be granted herein, and that the judgment of the trial court be reversed.

Respectfully submitted.

Kramer, Campbell, Costello & Wiechert, Fordyce, Holliday & White, Attorneys for Appellant.

And thereafter and on the 20th day of November, 1931, the following further proceedings were had and entered of record in said cause, to-wit:

No. 29577

RAY BERRY, Resp.,

vs.

THE BALTIMORE & OHIO RY. CO., App.

Now at this day, the court having seen and fully considered appellant's motion for a rehearing herein, doth order that said motion be, and the same is hereby overruled.

And thereafter and on the 23rd day of November, 1931, the appellant filed a motion to withhold issuance of the mandate, which said motion is in words and figures following, to-wit:

IN THE SUPREME COURT OF MISSOURI, DIVISION NO. 1, APRIL TERM, 1931

No. 29577

RAY BERRY (Plaintiff), Respondent,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation (Defendant), Appellant

Appeal from the Circuit Court of the City of St. Louis, Missouri

MOTION TO WITHHOLD ISSUANCE OF MANDATE

Comes now The Baltimore and Ohio Railroad Company, appellant in the above entitled cause, by its attorneys, and moves the court to withhold the issuance of mandate in the above entitled cause, and as grounds for such motion appellant shows to the court that on to-wit: the fifth day of September, A. D. 1931, this Court ordered that if respondent would, within ten days, enter a remittitur of $15,000.00, the judgment in the above entitled cause would be affirmed in the sum of $20,000.00; that afterwards, and within said ten days, said remittitur was entered and the judgment affirmed in the sum of $20,000.00. That afterwards, and within ten days from the fifth day of September, A. D. 1931, appellant filed its motion for rehearing in the above entitled cause, and afterwards, on the 20th day of November, A. D. 1931, this Court overruled appellant's said motion for rehearing.

Appellant desires to apply to the Supreme Court of the United States for a writ of certiorari in the above entitled cause, directed to this Court. That appellant, in appealing from the judgment of the trial court, gave an appeal bond in the sum of $45,000.00, which said bond is in full force and effect.

Appellant, therefore, respectfully moves this Court to stay the issuance of its mandate in the above entitled cause until appellant's application to the Supreme Court of the United States for said writ of certiorari is acted upon by the Supreme Court of the United States, and if said writ be granted until such time as the matters in said controversy in the above entitled cause are determined by the Supreme Court of the United States, and that the premises considered, no further security or bond be required of the appellant.

Respectfully submitted.

Kramer, Kramer & Campbell, Fordyce, Holliday & White, Attorneys for Appellant.

Service of the above motion and receipt of copy thereof is hereby acknowledged this 21st day of November, 1931.

Mark D. Eagleton, Harry M. Stone, Allen, Moser & Marsalek, Attorneys for Respondent.

And thereafter and on the 23rd day of November, 1931, the following further proceedings were had and entered of record in said cause, to-wit:

No. 29577

RAY BERRY, Resp.,

vs.

THE BALTIMORE & OHIO RY. CO., App.

Now at this day the court having seen and fully considered appellant's motion to stay the mandate of this court, doth order that said motion be, and the same is hereby sustained.

STATE OF MISSOURI, set:

I, Jacob D. Allen, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages present a full, true and correct copy of the record

and proceedings in the case of Ray Berry, Respondent, against The Baltimore & Ohio Railroad Company, a corporation, Appellant, No. 29,577, including copy of the judgment of the Circuit Court of City of St. Louis, Missouri, and of the order of said circuit court allowing an appeal from said judgment to the Supreme Court of Missouri; appellant's abstract of the record; submission of cause; conditional judgment; opinion of the Supreme Court; respondent's remittitur; judgment; appellant's motion for rehearing, together with the entry and order showing the filing and overruling of said motion; appellant's motion to stay the mandate and the order sustaining said motion, as fully and completely as the same appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and attached the official seal of said Supreme Court of the State of Missouri, at my office in the City of Jefferson, State aforesaid, this 24th day of November, 1931.

J. P. Allen, Clerk Supreme Court. (Seal of the Supreme Court of Missouri.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 21, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1836)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 703

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

RAY BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Counsel for Petitioner.

MORISON R. WAITE,
WILLIAM A. EGGERS,
E. C. HARTMAN,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

RAY BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a case based upon the Federal Employers' Liability Act, brought by respondent, Ray Berry, against petitioner, The Baltimore and Ohio Railroad Company, in

the Circuit Court of the City of St. Louis, Missouri, to recover the damages suffered by respondent occasioned by a severe injury sustained by him on February 10, 1926, by a fall from petitioner's trestle near Xenia, Illinois, while employed by petitioner as a rear brakeman on an interstate freight train of petitioner.

Respondent's petition shows that he and petitioner were engaged in interstate transportation at the time in question; that the trestle had no protective devices to prevent a person from falling therefrom; that the train stopped with the caboose on the trestle; that respondent was ordered to alight from the caboose; that it was nighttime and he, not knowing that the caboose was on the trestle, in pursuance of this order, stepped off the caboose, fell about twenty feet and sustained the injuries (R. 2-5).

The petitioner's answer contains a general denial, pleads assumption of risk by respondent and that his negligence was the sole cause of his injury (R. 6, 7, 72).

Trial was had before the Court and jury, and judgment rendered for $35,000. Appeal was perfected to the Supreme Court of the State of Missouri, where the judgment was affirmed in the sum of $20,000.

Respondent knew that the crew of the train had been ordered to take the passing track at Xenia to allow a train coming from the opposite direction to pass (R. 31, 80). The train's stop in question was made on the main line, with the caboose on the trestle, to allow the head brake-

man to open the passing-track switch in order that the train might enter the passing track (R. 31, 32, 41, 70, 80). A hot box on the train had been discovered before this stop was made (R. 13, 40), but it was not in a condition requiring early attention (R. 31, 32, 33). The order referred to in respondent's petition was an alleged order from petitioner's conductor to respondent while they were sitting in the cupola of the caboose to get out and go finish fixing the hot box, testified to by respondent (R. 31) and denied by the conductor (R. 40, 41). Respondent did step from the caboose while the train was so stopped, fell about twenty feet, and was injured. Respondent was an experienced brakeman (R. 30), familiar with the trestle (R. 17, 18, 31, 32) and all other matters involved.

The Supreme Court of the State of Missouri in its opinion (R. 69-86) found that there was nothing to show that the engineer was negligent in stopping the train with the caboose on the trestle (R. 74); that respondent was an experienced brakeman and was well acquainted with petitioner's tracks, road bed, as well as its equipment and method of operating its trains, etc. (R. 76); that respondent knew that the train must make the stop in question before passing onto the side track, and that ordinarily this stop being on the main line would be short and only long enough for the head brakeman to open the switch; that it would be the natural and proper thing to attend to the hot box when the train stopped on the pass-

ing track; that there is much reason to believe that the conductor would not order the respondent to fix the hot box at that place, and that the Court might surmise that the conductor only intended to remind respondent of his duty to look after the hot box as soon as the train passed onto the side track (R. 80).

The Supreme Court of the State of Missouri further held that the question of whether or not the conductor was negligent in giving the alleged order was a question for the jury (R. 80); that it was very dangerous to step off the caboose at the time in question (R. 71); that the ground of negligence on which a recovery was allowed was the negligence of the conductor in giving the negligent order to respondent to alight at this dangerous place (R. 75); that it was the duty of the conductor in making said order to ascertain whether the caboose stood in a reasonably safe place for respondent to alight, and that respondent had a right to rely on the conductor having performed this duty (R. 84). And that respondent did not assume the risk of his injury, basing that holding upon the proposition that this was not a usual and ordinary risk (R. 77), and that the order relieved him from assuming it (R. 77-80).

The only questions here raised are that the trial court should have directed a verdict in favor of the petitioner and should have withdrawn the allegation of negligence in respondent's petition covering the alleged negligent

order, and that the Supreme Court of the State of Missouri should have reversed the judgment because of the trial court's failure so to do. These questions were raised by petitioner's instruction in the nature of a demurrer to the evidence which was refused and exception duly saved (R. 44), and petitioner's instruction lettered "C" asking the withdrawal of this allegation of negligence which was refused (R. 53) and exception duly saved (R. 58).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1.

There is not, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, that quantum of evidence in this record sufficient to submit this case to the jury on the question of whether or not petitioner's conductor, A. J. Dant, gave to respondent a negligent order at the time in question (R. 31, 41). And, this being a material element of respondent's case, a verdict should have been directed for petitioner by the trial court because of the failure in the required quantum of evidence in this respect; and the judgment of the trial court should have been reversed by the Supreme Court of the State of Missouri for this reason.

2.

There is not, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, that quantum of evidence in this record sufficient to submit this case to the jury on respondent's first allegation of negligence, to wit:

> "They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries, as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe, as aforesaid" (R. 3).

And, this being a material element of respondent's case, this allegation should have been withdrawn by the trial court because of failure of the required quantum of evidence in this respect; and the judgment of the trial court should have been reversed by the Supreme Court of the State of Missouri for this reason.

3.

The trial court, in refusing to direct a verdict in favor of petitioner, and, in refusing to withdraw said first allegation of negligence; and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, for the causes above set forth in reason No. 1 and reason

No. 2, have decided a federal question in a way in conflict with the applicable decisions in this court in this class of cases on the question of the quantum of evidence legally required to permit the submission of a case to a jury. And each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the cases of

C., M. & St. P. R. Co. v. Coogan, 271 U. S. 472-474;
Gulf M. & N. R. Co. v. Wills, 275 U. S. 455-457;
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165-168;
Gunning v. Cooley, 281 U. S. 90;
Southern Railway Co. v. Walters, 52 S. C. R. 58;

and other decisions of this Court.

4.

The evidence for respondent on the question of whether or not petitioner's conductor gave to respondent a negligent order (R. 31) which the trial court submitted to the jury and upon which the Supreme Court of the State of Missouri affirmed the judgment of the trial court, is insubstantial, insufficient and is wholly consistent with the theory that the conductor ordered respondent to look after the hot box in question after the train entered the passing track in question; and, therefore, under the evidence in this record and under the applicable principles of law governing this class of cases as interpreted and ap-

plied in the Federal Courts, the respondent failed to prove that material element of his case by the quantum of evidence required, and the trial court should have directed a verdict in favor of petitioner for this reason, and the trial court having failed so to do, the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for this reason.

5.

The trial court, in refusing to direct a verdict in favor of petitioner on the grounds mentioned in above reason No. 4, and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, for the causes in reason No. 4 above set forth, have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on that question, and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the cases of Gunning v. Cooley, 281 U. S. 90-94; N. Y. C. R. Co. v. Ambrose, 280 U. S. 486-490, and other decisions of this Court.

6.

If it should be conceded that, under the federal rules, a jury question was raised by the evidence in this record on said first allegation of negligence and on the question of whether or not petitioner's conductor gave to respondent a negligent order at the time in question; still, under the

applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, and under the evidence in this record, respondent, as a matter of law, assumed the risk of his injury. And, this being a material element of defense, a verdict should have been directed by the trial court in petitioner's favor, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for that reason.

7.

The trial court, in refusing to direct a verdict in favor of petitioner on the ground that respondent assumed the risk, and the Supreme Court of the State of Missouri, in affirming the judgment of the trial court, have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on the question of when an experienced employe assumes the risk of injury, and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the following cases:

Chesapeake & Ohio Ry. Co. v. Kuhn, 52 S. C. R. 45;
Pryor v. Williams, 254 U. S. 43;
Missouri Pac. R. Co. v. Aeby, 275 U. S. 426-430;
Sea Board Air Line v. Horton, 233 U. S. 492-502;
Southern Pac. R. Co. v. Berkshire, 254 U. S. 415-416-418;
Jacobs v. Southern Ry. Co., 241 U. S. 229-236;
R. R. Co. v. Jones, 95 U. S. 439;

and other decisions of this Court. And the following decisions of other federal courts:

C. B. & Q. R. R. Co. v. Shalstrom, 195 Fed. 725-729 (C. C. A. 8th);
Chicago G. W. R. Co. v. Crotty, 141 Fed. 913-(C. C. A. 8th);
Union Pac. R. Co. v. Marone, 246 Fed. 916 (C. C. A. 8th);
Hogan v. B. & O. R. R. Co., 15 Fed. (2d) 729 (C. C. A. 6th.);
Hallstern v. Pa. R. Co., 30 Fed. (2d) 594 (C. C. A. 6th);
Southern R. Co. v. Logan, 138 Fed. 725 (C. C. A. 4th);

and other cases.

8.

If it should be conceded that, under the federal rules, a jury question was raised by the evidence in this record on said first allegation of negligence and on the question of whether or not petitioner's conductor gave to respondent a negligent order at the time in question; still, under the applicable principles of law governing this class of cases, as interpreted and applied in the federal courts, and under the evidence in this record respondent's negligence, as a matter of law, was the proximate and sole cause of his injury, and this being a material element of defense a verdict should have been directed in petitioner's favor by the trial

court and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court for that reason.

9.

The trial court, in refusing to direct a verdict in favor of petitioner on the ground that respondent's negligence was the proximate and sole cause of his injury and the Supreme Court of the State of Missouri in affirming the judgment of the trial court have decided a federal question in a way in conflict with the applicable decisions of this Court in this class of cases on the question of when an experienced employe's injury is caused by his sole negligence; and each of said courts failed to apply the rules laid down on that question in the decisions of this Court in the following cases:

Great Northern Ry. Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147;
Kansas City S. R. Co. v. Jones, 276 U. S. 303;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787.

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, commanding that court to certify and

send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in a cause entitled and numbered on its docket, Ray Berry, respondent, against The Baltimore and Ohio Railroad Company, appellant, No. 29,577. That said judgment of the said Supreme Court of the State of Missouri may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

By RUDOLPH J. KRAMER,
BRUCE A. CAMPBELL,
Counsel for Petitioner.

MORISON R. WAITE,
WILLIAM A. EGGERS,
E. C. HARTMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.....

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Petitioner,

vs.

RAY BERRY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no opinion of the trial court in this case.

The opinion of the Supreme Court of the State of Missouri appears in the printed record, pages 69 to 86, inclusive. It is reported in 43 S. W. (2d), p. 782 (Advance Sheets No. 5, January 12, 1932). The case is not yet reported in official Missouri reports.

The Supreme Court of Missouri denied the motion for rehearing without opinion (R. 90).

II.

JURISDICTION.

1.

Jurisdiction of this Court is based upon Judicial Code, Section 237, as amended by the Act of February 13, 1925, 43 Stats. 937; United States Code, Title 28, Paragraph (b), Section 344, permitting petitions for certiorari to be prayed for and issued to the highest courts of the various states where a title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

The jurisdiction of this Court upon the Federal question involved is based upon the fact that this suit is brought solely under the Federal Employers' Liability Act of April 22, 1908, as amended, 35 Stats. 65 & 66; United States Code, Title 45, Sections 51 to 59, inclusive.

Some cases sustaining the jurisdiction are:

Sea Board Air Line Ry. Co. v. Horton, 233 U. S. 492-499;

Minneapolis, St. P. & S. St. M. Ry. Co. v. Goneau, 269 U. S. 406;

Gulf R. R. Co. v. Wells, 275 U. S. 455;

Atlantic Coast Line Co. v. Davis, 279 U. S. 34.

2.

The Supreme Court of the State of Missouri is the highest court of that state.

The original date of the judgment of the Supreme Court of the State of Missouri to be reversed is September 5, 1931 (R. 69).

Motion for rehearing was filed September 14, 1931, within the time provided by the rules of the Supreme Court of the State of Missouri (R. 87) and the motion for rehearing was denied November 20, 1931 (R. 90).

3.

Only two questions are raised in this court on this record. The first question is whether or not the trial court should have directed a verdict in favor of petitioner and whether or not the Supreme Court of the State of Missouri erred in not reversing the judgment of the trial court because of its failure to direct a verdict for petitioner. This question was raised by a proper instruction offered at the close of respondent's evidence (R. 33, 34) and by a proper instruction offered at the close of all of the evidence in the case (R. 44).

The second question is whether or not the trial court should have withdrawn the first allegation of negligence in respondent's petition (R. 3, 53, 58) and whether or not the Supreme Court of the State of Missouri erred in not reversing the judgment of the trial court because of its failure to withdraw that allegation of negligence.

III.

STATEMENT OF THE CASE.

This is a case based upon the Federal Employers' Liability Act, brought by respondent, Ray Berry, against petitioner, The Baltimore and Ohio Railroad Company, in the Circuit Court of the City of St. Louis, Missouri, to recover the damages suffered by respondent occasioned by a severe injury sustained by him on February 10, 1926, by a fall from petitioner's trestle near Xenia, Illinois, while employed by petitioner as a rear brakeman on an interstate freight train of petitioner.

The pleadings are an amended petition, amended answer to the amended petition, and the reply.

In respondent's amended petition it is alleged that petitioner is a corporation owning and operating a railroad as a common carrier engaged in commerce between the State of Illinois and other states, and as such in its business owned, operated, etc., and was using the thereinafter mentioned engines, cars, railroad equipment, roadbed, trestle and appurtenances.

That on or about February 10, 1926, respondent was in petitioner's employ as a brakeman and while engaged in his duties as such was upon a train of petitioner moving in interstate commerce from Illinois to the State of Indiana and transporting goods, etc., in interstate commerce, and that respondent and petitioner was then engaged in interstate commerce.

That petitioner, by its servants and agents, other than respondent, stopped said train near and west of Xenia, Illinois, with the caboose thereof on a trestle, having no railings or protective devices thereon to protect persons from falling therefrom; that the step of the caboose extended out to about the edge of the trestle, so that a person alighting from the caboose would fall from the trestle about twenty feet and sustain injuries; that the trestle and situation there was dangerous and not reasonably safe; that respondent in the night-time, not knowing that the caboose was on the trestle, acting pursuant to order, stepped off the caboose and fell about twenty feet and sustained injuries and damage. That respondent's fall and injuries directly and proximately resulted in whole or in part from the negligence of petitioner, its officers and agents, other than respondent, and by reason of and as a direct result of defects or insufficiencies, due to petitioner's negligence, in petitioner's cars, tracks, roadbed, works, etc., as follows:

1. They negligently ordered, directed, caused and permitted respondent to alight from the caboose there causing his fall and injuries, as aforesaid, although they knew, or by the exercise of ordinary care would have known of said condition, and they negligently assured respondent of safety, although it was dangerous and not reasonably safe as aforesaid.

2. They negligently caused and permitted the caboose to stop on the trestle as aforesaid, although they knew, or

by the exercise of ordinary care would have known that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe.

(Three other grounds of negligence were alleged but upon the trial these were abandoned [R. 75] and the case went to the jury on the two grounds above mentioned [R. 72].)

That as a direct and proximate result of said negligence and carelessness respondent suffered severe injuries which are detailed, and alleging damages in the sum of $65,000 (R. 2, 5).

The petitioner's amended answer contains a general denial; pleads assumption of the risk by respondent, and that respondent's negligence was the proximate and sole cause of his injury (R. 6, 7, 72).

The reply is a general denial (R. 6, 7).

The case was tried at the February Term, 1928, before Honorable H. A. Hamilton, Judge, and a jury. On that day the jury returned a verdict in favor of respondent and against petitioner in the sum of $35,000, and the Court rendered judgment on the verdict.

In due time, on February 29, 1928, at the same term, petitioner filed its motion for a new trial. On June 25, 1928, at the June Term of court, the Court overruled the motion for new trial and refused to set aside the judgment. An appeal was duly taken to the Supreme Court of the State of Missouri. That appeal was duly heard in

that court, and on September 5, 1931, that Court affirmed the judgment in the sum of $20,000, on condition that respondent enter a remittitur of $15,000 within ten days (R. 69-86). Said remittitur was entered on September 11, 1931, and on that day the judgment was affirmed in the sum of $20,000 and costs (R. 87).

In due time on September 14, 1931, petitioner presented a motion for rehearing (R. 87-90) and on November 20, 1931, a rehearing was denied by the Court, no opinion being filed (R. 90).

The facts appearing upon the trial are that respondent was 32 years of age. He had been employed by petitioner as a railroad brakeman about nine years. During all that time he was employed on freight trains, his run being from East St. Louis to Beardstown or Shawneetown in Illinois, or from East St. Louis to Washington, Indiana. On each of these trips he was required to pass through Xenia, Illinois (R. 30). He was an experienced brakeman and was well acquainted with petitioner's road bed, equipment and its method of operating trains (R. 76, 80). The day in question was February 10, 1926. On that day respondent was working as a rear brakeman on his regular run on a freight train running in an easterly direction from East St. Louis, Illinois, to Washington, Indiana. The train consisted of an engine, tender, forty-two cars and a caboose (R. 12, 40). The crew consisted of an engineer, fireman, conductor, head brakeman who rode on the en-

gine, and respondent, the rear brakeman, who rode in the caboose with the conductor (R. 11).

The accident happened at about 4:30 a. m. at one of appellant's bridges or trestles a short distance west of the Village of Xenia. Xenia is a village of about 640 inhabitants. At this village petitioner has three railroad tracks, one main track, a passing track and a house track. The distance from petitioner's passenger station in Xenia to the west end of the switch leading from the main track to the passing track is 1,983 feet. The distance from the west end of this switch to the trestle in question is 1,945 feet. The western corporate line of the village of Xenia is about 100 feet east of this trestle (R. 39). This trestle is forty-one feet long and nine feet wide. It is the usual width of petitioner's bridges or trestles—just about the width of a caboose. It was equipped with no sidewalk or railing. Respondent knew this (R. 17, 18, 31, 32). There were sixty-five trestles or bridges between East St. Louis, Illinois, and Washington, Indiana. Between forty-five and fifty of these were similar to the one in question. There were five or six that had a sidewalk or railing on the side. All of the rest of them were without sidewalk or railing. The only bridges or trestles equipped with sidewalks or railings were those located so close to a switch that a man getting off the front end of the train to let it into the siding would have to walk over such trestle or bridge to open the switch. There was no sidewalk on any trestle

or bridge that was more than 300 feet from such switch (R. 35, 36).

Before the train reached the trestle in question the crew in charge of it had orders to go into the passing track at Xenia to wait there until another train coming from the east passed them (R. 31, 80). In making this movement into the passing track the train would stop near the passing-track switch. The head brakeman would get off the engine, go forward and open the switch, and the rear brakeman, respondent, would get off the caboose after it had passed the switch and go back and close the switch (R. 32, 38, 40, 74). The conductor, engineer and respondent each knew of these orders and each knew when this stop was made, the train then being on the main line, that it would be there long enough only to permit the head brakeman to open the switch (R. 31, 32, 41, 70, 80). The train waited on this siding about an hour before the other train arrived (R. 43). About four miles east of Xenia respondent and the conductor discovered a hot box on the train in question. Respondent testified that he saw the hot box blazing; that he called the conductor's attention to it, the train was stopped on the main line, they both went forward and looked at this hot box. That they had moved east about one mile from the place where the hot box was first discovered before that stop was made. That the conductor sent him to the engine to get a bucket of water to put out the fire; told him to tell the engineer that at the

next stop, at Xenia, they would finish fixing the hot box and that he conveyed that message to the engineer (R. 13). That the fire in the hot box was extinguished there west of Xenia (R. 31), and it did not reappear (R. 32, 33); that the train then moved eastward until it stopped for the purpose of having the switch opened so that it could pass into the passing track. This stop was made with the engine one and one-half to three car lengths from the passing-track switch, a usual and proper place to stop (R. 74). This placed the caboose on the trestle in question.

Respondent further testified that he and the conductor were in the cupola of the caboose when this stop was made and that the conductor said to him to get out and go and finish fixing the hot box (R. 31).

Respondent further testified that he knew at that time that the train was not on the passing track (R. 32); that after he received this order from the conductor he took his lantern and started to get off the caboose, walked down the caboose steps, thought he was stepping on the ground, but stepped off the trestle and fell about twenty feet (R. 13, 14).

The conductor, A. J. Dant, testified that the hot box was discovered by smelling; that he and respondent got down out of the cupola of the caboose, went to the rear platform of the caboose and hung out on the steps and looked up and down each side of the train, but couldn't see anything; saw no blaze and were not able to locate the hot box; that the train did not stop; that respondent did

not get off to examine the hot box, did not go to get any water, and that no stop was made until the stop in question, when they were intending to pass in the passing track; that after the stop in question was made he did not say anything to respondent with reference to the hot box; did not make any request of him with reference to the hot box and did not know that respondent intended to get off the caboose; that all he saw was that he saw the respondent get down out of the cupola and then afterwards heard him hallooing after he had fallen (R. 40, 41). There were no persons in the caboose other than the conductor and the respondent. The conductor expected to have the hot box fixed while the train was waiting on the passing track (R. 43).

At the close of respondent's evidence, petitioner submitted to the Court an instruction in the nature of a demurrer to the evidence, which was refused and exception duly saved (R. 33).

At the close of all the evidence, petitioner submitted a like instruction which was refused and exception duly saved (R. 44). Petitioner also submitted instructions asking the withdrawal of each assignment of negligence alleged in the petition, each of which was refused and exception duly saved (R. 53-58). As each assignment of negligence, other than the first and second, was abandoned on the trial, the refusal to withdraw the others did not constitute serious error (R. 75).

The trial court gave to the jury on behalf of respondent two instructions, the first of which was based upon the

first and second allegations of negligence and detailed the transactions in question in accordance with respondent's contention, and stated to the jury that if they found those things that their verdict must be in favor of the respondent. This instruction did not mention assumed risk, but did require a finding that respondent was in the exercise of due care (R. 45). The second was an instruction on damages (R. 47). To the giving of each of which an exception was saved.

The trial court also gave nine instructions requested by petitioner (R. 48-52).

The Supreme Court of the State of Missouri, in its opinion (R. 69-86), found that the alleged conversation between the respondent and the engineer was of no importance (R. 70, 74). That there was nothing to show that the engineer was negligent (R. 74); that respondent was an experienced brakeman and was well acquainted with petitioner's tracks, roadbed, as well as its equipment and method of operating its trains, etc. (R. 76). That respondent knew that the train must make the stop in question before passing onto the side track, and that ordinarily this stop, being on the main line, would be short and only long enough for the head brakeman to open the switch; that it would be the natural and proper thing to attend to the hot box when the train stopped on the passing track; that there is much reason to believe that the conductor would not order respondent to fix the hot box at that place; that the Court might surmise that the conductor only intended to remind respondent of his duty to

look after the hot box as soon as the train passed onto the side track (R. 80).

That there was no reversible error in the trial court's action in submitting the second allegation of negligence in respondent's petition to the jury because in submitting it by respondent's instruction on liability (R. 45, 46), the first and second grounds of negligence are connected with the conjunction "and" and the jury were required to find both grounds of negligence before they were justified in finding a verdict for respondent (R. 74), and that the ground of negligence on which a recovery was allowed was the negligence of the conductor in giving the negligent order to respondent to alight at a dangerous place (R. 75).

That the Court also held that the question of whether or not the conductor was negligent in giving the alleged order was a question for the jury (R. 80); that it was very dangerous to step off the caboose at the place in question (R. 71); that respondent was not guilty of negligence as a matter of law (R. 85); that it was the duty of the conductor in making said order to ascertain whether the caboose stood in a reasonably safe place for respondent to alight, and that respondent had a right to rely on the conductor having performed this duty (R. 84). And that respondent did not assume the risk of his injury, basing that holding upon the proposition that this was not a usual and ordinary risk and that the order relieved him from assuming it (R. 77-80).

IV.

SPECIFICATION OF ERRORS.

1.

The trial court erred in refusing to give and read to the jury the written request for the instruction in the nature of a demurrer to the evidence asked by petitioner at the close of all of the evidence offered in the case, which said instruction so offered and there refused by the trial court is in words and figures as follows, to wit:

> "At the close of the whole case the Court instructs the jury that under the law and the evidence your verdict must be for defendant" (R. 44).

2.

The Supreme Court of the State of Missouri erred in refusing to reverse the judgment of the trial court on account of the error of the trial court above set forth in specification of error No. 1.

3.

The trial court erred in refusing to give and read to the jury written instruction lettered C offered by petitioner, which said instruction so offered and there refused is in words and figures as follows, to wit:

"Among other things, plaintiff charges that the defendant was negligent in that plaintiff claims:

> " '1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, although they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid.'

"There is no evidence which under the law warrants you in finding against the defendant under this assignment, and it is therefore withdrawn from your consideration" (R. 53, 54, 58).

4.

The Supreme Court of the State of Missouri erred in refusing to reverse the judgment of the trial court on account of the error of the trial court above set forth in specification of error No. 3.

5.

The Supreme Court of the State of Missouri erred in affirming the judgment of the trial court.

6.

The Supreme Court of the State of Missouri erred in failing and refusing to reverse the judgment of the trial court.

V.

SUMMARY OF THE ARGUMENT.

1.

The trial court should have directed a verdict in favor of petitioner, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court on account of its failure so to do:

A. The evidence is not sufficient to submit the case to the jury on the question of whether or not the conductor gave a negligent order to respondent.

B. The alleged order to the respondent was not a negligent order.

C. Under any construction of the alleged order, respondent assumed the risk.

D. Under any construction of the alleged order, respondent's negligence was the proximate and sole cause of his injury.

2.

The trial court should have withdrawn the first allegation of negligence in plaintiff's petition (R. 3, 54, 55, 58) from the jury, and the Supreme Court of the State of Missouri should have reversed the judgment of the trial court on account of its failure so to do.

VI.

ARGUMENT.

1.

The Trial Court Should Have Directed a Verdict in Favor of Petitioner, and the Supreme Court of the State of Missouri Should Have Reversed the Judgment of the Trial Court on Account of Its Failure so to Do.

A.

The evidence is not sufficient to submit the case to the jury on the question of whether or not the conductor gave a negligent order to the respondent.

While the trial court refused to withdraw from the jury the second allegation of negligence (R. 54, 58), and the Supreme Court of the State of Missouri says that it would agree with our contention that the evidence does not justify the submission of this allegation of negligence if it stood alone and constituted a separate and independent ground on which recovery was predicated (R. 73-74), The Supreme Court further holds that the instruction (R. 45-46) on liability, given for respondent, submitted to the jury the first and second allegations of negligence together and required a finding on both before a recovery was justified; and that, as it was necessary to find that the caboose was stopped on the trestle, it was of no importance whether or not the same was negligently done.

That, therefore, there was no reversible error in refusing to withdraw this allegation of negligence from the jury. And the judgment was not affirmed on the ground that the second allegation of negligence was proved, but was affirmed on the ground that "the real ground of negligence, therefore, on which plaintiff was allowed to recover was the negligence of the conductor in giving the negligent order to plaintiff to alight at this dangerous place."

Respondent was an experienced employe in the position he had at the time of his injury. He had been so employed by petitioner on its freight trains about nine years, and during all that time his run passed over the trestle in question (R. 30). He was familiar with the trestle (R. 17-18, 31-32) and with petitioner's roadbed, equipment, methods of operating trains, etc. (R. 76, 80). Before the train reached this trestle the train crew had orders to take the passing track at the Village of Xenia and to wait there until a westbound train passed them. Respondent knew of these orders and he then knew that this train intended to take the passing track at that village (R. 31-32, 41, 70, 80). More than that he knew at the time the train made the stop in question that it was not on the passing track; that it had made this stop in order to take the passing track, and that it would remain there on the main line only long enough to permit the head brakeman to get off the engine and open the switch for the passing track (R. 32, 70, 80). He also knew that the train would be compelled to wait on the passing track for the other

train that it was to meet. Even if he is correct in his testimony with reference to the hot box blazing, that stop was made about three miles from the Village of Xenia. The fire was entirely extinguished (R. 31, 32, 33). He knew there was no special need of hurry with reference to this hot box. The message to the engineer that he says he conveyed for the conductor was not that the hot box would be fixed at the next stop, but it was that it would be fixed at the next stop at Xenia (R. 13). Respondent, therefore, could not have supposed, under any circumstances, that they would fix the hot box until the train was on the passing track at Xenia.

At the time the alleged conversation took place the conductor and respondent were both sitting in the cupola of the caboose (R. 31). The conductor denied that any conversation took place (R. 40-41). These matters being true, then it seems to us that his statement that the conductor ordered him to get out and finish fixing the hot box while the stop in question was being made, and that he then attempted to obey the order, is so contrary to what an experienced brakeman would understand and do, and is so contrary to what could possibly have happened that it does not amount to reasonable evidence, and is so insubstantial and insufficient that it did not justify a submission of that issue to the jury under the decisions of this Court.

Under the federal rules a scintilla of evidence is not sufficient. There must be reasonable and substantial evi-

dence for the plaintiff before the case can be submitted to the jury. The evidence in favor of the plaintiff must be of such a substantial character that if a verdict were returned for the plaintiff the Court would not have to set it aside in the exercise of sound judicial discretion. If the Court, even with conflicting evidence, in the exercise of sound judicial discretion, ought to set aside a verdict for the plaintiff, if rendered, then, under such circumstances, a verdict should be directed in favor of the defendant.

Barrett v. Virginian R. Co., 250 U. S. 473-476;
A. B. Small Co. v. Lamborn & Co., 267 U. S. 248-254.

In order legally to permit the submission of a case to the jury there must be reasonable evidence to show the breach of duty by the defendant.

Delaware R. Co. v. Koske, 279 U. S. 7.

The evidence for the plaintiff must be substantial evidence before the case can be submitted to the jury.

Atlantic Coast Line v. Davis, 279 U. S. 34.

B.

The alleged order to respondent was not a negligent order.

If it be assumed that the alleged order of the conductor to respondent was given, it was not a negligent one. The

conductor and respondent then were both sitting in the cupola of the caboose. Each had an equal opportunity to judge as to the conditions. Respondent's experience was equal to that of the conductor. In fact, respondent's knowledge of every circumstance involved was equal to that of the conductor. To get out of the caboose did not mean to step off the caboose to the ground. The car on which the hot box was could have been easily reached by passing over the rear cars. But an experienced brakeman could understand such an order to mean only to attend to fixing the hot box after the train passed onto the passing track, and could understand such an order to be only a reminder to do that work at that time.

In the case of C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, on page 474 of the opinion, in a case of this kind, it is said:

> "The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was the cause of the death, judgment against the carrier will be reversed."

And on page 478 of the opinion it is said if the record

leaves the matter in the realm of speculation and conjecture then a verdict should be directed.

In the case of N. Y. C. R. Co. v. Ambrose, 280 U. S. 486, on page 490 of the opinion it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employe to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. * * * If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from the settled rules of proof resting upon plaintiffs."

In the case of Gunning v. Cooley, 281 U. S. 90, on page 94 of the opinion it is said:

> "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither."

Under these authorities we submit that respondent has wholly failed to prove that he was required to alight from the caboose at the time in question.

C.

Under any construction of the alleged order, respondent assumed the risk.

That respondent was experienced and had equal knowledge with the conductor is not denied. But the Supreme Court of the State of Missouri held that this was an extraordinary risk; that while it was not necessary to say that the doctrine of assumed risk never applies to a negligent order of the master, that it did not apply under the facts of this case (R. 77). That, under the circumstances, respondent was not required to investigate the possible danger and find out whether he could safely obey such order before doing so (R. 80, 81). That respondent had the right to rely upon the superior authority and knowledge of the conductor, and to assume that he would not order respondent to alight from the caboose unless at a place where he could safely do so (R. 81). That it was the duty of the conductor to get down from the cupola and investigate the situation under the caboose before giving the order, and that respondent had the right to rely upon the proposition that the conductor had done this (R. 84). Yet the evidence shows that the respondent knew the conductor never moved from the seat in the cupola (R. 31, 41).

We also respectfully submit that the Supreme Court of the State of Missouri confuses assumed risk and contribu-

tory negligence (R. 79), while they are clearly distinguishable.

Schlemmer v. B. R. & P. R. Co., 220 U. S. 590-596.

We submit that the effect of an order of the kind involved in this case on the doctrine of assumed risk as ruled by the Supreme Court of the State of Missouri in this case and the cases cited in the opinion is not the law in the federal courts. This case does not involve an assurance of safety. It does not involve a situation where the conductor, by his experience, training, education, etc., had a knowledge superior to that of the respondent, and we submit that no such distinction as was made by the Court in this case is made in the federal courts.

In the case of C. & O. Ry. Co. v. Kuhn, 52 S. C. R. 45, the employe was an experienced section hand. The order was given to him and the other section men by the assistant foreman in charge of them. The employe was ordered to use a defective sledge hammer and chisel, the job was a hurry-up one. The assistant foreman in charge told the men "to gang up and go in a hurry; that he wanted to get through there." "Don't be afraid." And it was held that a verdict should have been directed because the employe assumed the risk.

In the case of R. R. Co. v. Jones, 95 U. S. 439, a section foreman and his gang were leaving for home on a train. The plaintiff, a section man, was ordered by the foreman

to jump on the train anywhere; that they were behind time and must hurry. The plaintiff, instead of going inside a car, rode on the pilot of the locomotive, and it was held that he could not recover.

In the case of Pryor v. Williams, 254 U. S. 43, the plaintiff was engaged in tearing down a bridge. He was ordered by his foreman to use a defective claw bar. He contended that in obeying the order of the foreman he did not pause to make an inspection, but used the tool without any but a casual inspection, which did not reveal the defect. And in that case it was held that the doctrine of assumption of risk did apply.

In the case of Southern R. Co. v. Logan, 138 Fed. 725 (C. C. A. 4th), a conductor was injured in moving a dining car ahead of the engine; he was instructed by his superior, the yardmaster, to so handle the car, and yet it was held that he assumed the risk.

In the case of Chicago Great Western R. Co. v. Crotty, 141 Fed. 913 (C. C. A. 8th), a brakeman was ordered by the conductor, his superior officer, to move a car by means of a stake and was injured in so doing, and in that case it was held he assumed the risk.

In the case of Union Pac. R. Co. v. Marone, 246 Fed. 916 (C. C. A. 8th), a section man was directed by his foreman to cut a steel rail in a certain way. The section man objected to doing the work without goggles to protect his eyes. He was directed by his foreman to "go on, that's

all right, we never use them." And in that case it was held that he assumed the risk.

In the case of Hogan v. B. & O. R. R. Co., 15 Fed. (2) 739 (C. C. A. 6th), a car repairer was required to do certain work repairing cars. He requested that a proper instrument be furnished him. His foreman refused and required him to use a long wrench which was an unsafe appliance. And in that case it was held he assumed the risk.

In the case of Hallstern v. Pennsylvania R. Co., 30 Fed. (2) 594 (C. C. A. 6th), a railroad employe was ordered by his foreman to install an electric light on a coal tipple. Plaintiff demanded a safety belt, but he was ordered by the foreman to proceed without a belt. It was contended on account of the order that the doctrine of assumption of risk was inapplicable. But it was held that the doctrine did apply.

We submit that under the facts in this case, although the conductor was superior in authority, he did not have any knowledge superior to that of the respondent, and that, under the facts in this record, it ought not to be held that respondent could rely upon the proposition that the conductor did have superior knowledge; and that, under the authorities above cited, the Supreme Court of the State of Missouri is in error in holding that the mere fact that such order was given relieved respondent of the assumption of the risk.

D.

Under any construction of the alleged order respondent's negligence was the proximate and sole cause of his injury.

The Supreme Court of the State of Missouri held that in view of the darkness and the small lantern carried by respondent, which alone gave any light, it could not be held that respondent was negligent as a matter of law, and it further held that if it was so decided that this would be only contributory negligence and not defeat respondent's action (R. 85). It is true that negligence of an employe in this class of cases may be only contributory negligence and may amount to no more than diminution of damages, but it is also true in this class of cases that an employe's negligence may be the proximate and sole cause of his injury.

Great Northern Ry. Co. v. Wiles, 240 U. S. 444;
Frese v. C. B. & Q. R. Co., 263 U. S. 1;
Davis v. Kennedy, 266 U. S. 147;
Kansas City S. R. Co. v. Jones, 276 U. S. 303;
Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787.

It is true that this record does not show a situation with reference to respondent's negligence so clear as were the facts in most of the cases above cited, but in view of respondent's experience and knowledge, in view of the

situation as to the conductor and respondent when the alleged conversation took place, in view of the fact that the train was then on the main line and was almost in the act of passing onto the passing track, and the fact that there was no fire in the hot box, no hurry on that account, in our opinion there is no material difference between the facts in the case of Atlantic Coast Line R. Co. v. Driggers, 279 U. S. 787, and the facts in the case at bar on this point.

True, it was in the nighttime, but respondent was an experienced brakeman (R. 76). He had his lantern; it was an ordinary railroad lantern (R. 13). Of course, the rays would not shine directly down through the bottom of the lantern (R. 14). That would be true of any lantern. He knew the trestle was about the same width as the caboose (R. 17, 18, 31, 32). Respondent stepped from the caboose without the exercise of any kind of care or caution. The Supreme Court of Missouri does not hold that he exercised care, but it seems to assume that under the case of Chesapeake & Ohio Ry. Co. v. De Atley, 241 U. S. 310, it was not necessary for respondent to exercise any kind of care (R. 79). And, although the conductor was sitting in the cupola of the caboose during all the time in question (R. 31, 41), the Supreme Court of Missouri excuses respondent's action on the theory that the conductor should have ascertained whether or not respondent could obey the order in safety, should have ascertained whether the caboose stood in a reasonably safe place for

respondent to alight, and that respondent had the right to rely on the conductor having performed that duty (R. 84), although respondent knew the conductor did not move from his seat.

We respectfully submit that there is no sound basis for such ruling and that the Supreme Court of Missouri erred in so holding.

2.

The Trial Court Should Have Withdrawn the First Allegation of Negligence in Plaintiff's Petition (R. 3, 54, 55) From the Jury, and the Supreme Court of the State of Missouri Should Have Reversed the Judgment of the Trial Court on Account of Its Failure so to do.

What has been said above in this argument applies to this point also. To argue this point is to go over the same ground. If we are correct in either of our contentions above made, then we are correct as to this.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be corrected and that the law may be properly and authoritatively defined. That the judgment of the Supreme Court of the State of Missouri in this case should

be reversed in order that justice may be done to petitioner, and that, to such end, a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of the State of Missouri and finally reverse it.

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APPENDIX.

Title 45, Chapter 2, Section 51, U. S. C. A.

Section 51. **Liability of Common Carriers by Railroad, in Interstate or Foreign Commerce, for Injuries to Employes From Negligence.**—Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or per personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. (April 22, 1908, c. 149, sec. 1, 35 Stat. 65.)

Ibid., Section 56. **Actions, Limitation, Concurrent Jurisdiction of Courts, Removal of Case in State Court.**—No

action shall be maintained under this chapter unless commenced within two years from the day the cause of action occurred.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be living at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states, and no case arising under this chapter and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (April 22, 1908, c. 149, sec. 6, 35 Stat. 66; April 5, 1910, c. 143, sec. 1, 36 Stat. 291.)

Ibid., Section 59. **Survival of Right of Action of Person Injured.**—Any right of action given by this chapter to a person suffering injury shall survive to his of her personal representative, for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, but in such cases there shall be only one recovery for the same injury. (April 22, 1908, April 5, 1910, c. 143, sec. 2, 36 Stat. 291.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 703.

THE BALTIMORE & OHIO RAILROAD COMPANY, Petitioner,

v.

RAY BERRY, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Respondent filed this suit in the Circuit Court, City of St. Louis, Missouri, to recover damages on account of injuries suffered by him while in the petitioner's employ. In the trial court he recovered judgment in the sum of $35,000. The petitioner, by due steps, appealed the case to the Supreme Court of Missouri, where the judgment was affirmed on condition that respondent remit $15,000 from the judgment. Respondent duly made such remittitur, in accordance with the Court's order.

The evidence at the trial showed without controversy that at the time of the accident petitioner and respondent were engaged in interstate commerce. Respondent's petition, filed in the trial court, alleges, and the evidence shows, that on February 10, 1926, he was performing the duties of rear brakeman, or flagman, on one of defendant's freight trains running from East St. Louis, Illinois, to Washington, Indiana. The train left East St. Louis on the night of February 9th, and about 4:30 the next morning, while it was still dark, was brought to a stop at Xenia, Illinois, with the caboose of the train extending over a trestle. The trestle had no walkway beside the track, and no railing or other protective device to prevent persons from falling therefrom. The caboose was practically the same width as the trestle. Respondent, at the order of the conductor of the train, alighted from the caboose, not knowing that it was on the trestle, and fell a distance of about twenty feet, suffering severe and permanent injuries.

Respondent's petition sets out a number of allegations of negligence on the part of petitioner's servants, other than respondent, as the cause of the injury, but we will notice only the two following, which were submitted to the jury:

> "1. They negligently ordered, directed, caused and permitted plaintiff to alight from said caboose there, causing plaintiff's fall and injuries as aforesaid, al-

though they knew, or by the exercise of ordinary care would have known, of the aforesaid condition, and they negligently assured plaintiff of safety, and they thereby negligently assured plaintiff of safety, although it was dangerous and not reasonably safe as aforesaid.

"2. They negligently caused and permitted said caboose to stop on said trestle as aforesaid, although they knew, or by the exercise of ordinary care would have known, that it was likely to cause injuries as aforesaid, and was dangerous and not reasonably safe" (Abs., p. 3).

The petitioner's answer was a general denial, and a plea that respondent assumed all the ordinary risks incident to his employment, and all extraordinary risks which he knew and appreciated, or which would have been apparent to him; further, that his injury was due to his own negligence directly contributing thereto, in failing to look where he was stepping when he stepped off the caboose, although he knew there was a trestle in the vicinity of the place where the train and caboose were stopped.

The reply of respondent was a general denial.

Respondent testified that he had been in the employ of the petitioner for about nine years at the time of his accident. Just previous to his accident he was riding in the caboose of the train (Rec., p. 11), which consisted of forty-two cars, each about forty-two feet long. The en-

gine, with its tender, was probably sixty or seventy-five feet in length, and the caboose about forty feet (Rec., p. 32).

Three or four miles west of Xenia, Illinois, respondent and Mr. Dant, the conductor, discovered a hot box on one of the cars, eight or nine cars ahead of the caboose. They were in the caboose at the time. The oil and waste in the box was on fire and was blazing. The conductor decided to stop the train. The respondent signaled the engineer. The train stopped at a point about three miles west of Xenia, and the respondent and the conductor go off. The conductor sent respondent to the engine to get a bucket of water to put out the fire, and told respondent to tell the engineer that at the next stop, at Xenia, they would finish fixing the hot box (Rec., p. 13). Respondent conveyed this order to the engineer and returned with the bucket of water, and he and the conductor used it to extinguish the flames. The train then proceeded eastwardly again, and stopped after moving a distance which respondent estimated to be three miles. When the train stopped the conductor ordered respondent **to get out and go ahead and fix the hot box; to finish fixing it.** Respondent was unaware of the fact that the caboose was upon the trestle when the conductor ordered him off. He stated:

> "After receiving this last message or order from the conductor, I took my lantern and started to get

off the caboose, I suppose, to fix it, to go on back up there and finish fixing the hot box, and I walked down the caboose steps, and I thought I was stepping on the ground, and I stepped off into space. I was carrying the lantern in my left hand. It was a small railroad lantern; signal lantern, in other words" (Rec., p. 13).

Respondent testified that his lantern threw out a circle of light, around about the center of the lantern, but the light did not extend up and down. Respondent further testified:

"Q. **Had this train, or any other train, to your knowledge, at any other time in your entire experience, ever stopped with the caboose or any part of it on top of this trestle?**

A. **No, sir**" (Rec., p. 15).

When the train stopped the locomotive was at the switch leading into the passing track at Xenia. Respondent did not know whether the caboose of a forty-two-car train, stopped with the locomotive at the passing track switch, would clear the trestle or not. He had no experience in that connection (Rec., p. 33).

Albert H. Woerner, a witness for petitioner, described the trestle in question, and stated that there were between forty-five and fifty such trestles between East St. Louis, Illinois, and Washington, Indiana. Five or six of them

had sidewalks or railings on the side. Sidewalks and railings were installed where they were absolutely needed for the safety of the trainmen. They were installed for the safety of the switchman who was required to get off the front end of the train to open the switch. They were not placed on trestles more than 250 or 300 feet from a switch. The trestle in question was 1,950 feet from the switch.

Harry S. Smith, petitioner's trainmaster, described the duties of the rear brakeman or flagman as follows:

> "It is the duty of the rear brakeman or flagman to ride the rear car of the train, and it is their duty **to protect the train at all times when it is standing on the main track**, and at other times it is his duty **to assist the members of the crew in performing the duties assigned to them, closing switches, opening switches, setting off cars, picking up cars, fixing hot boxes and so forth.** If a train is out on the main line and is to pass from the main line onto the passing track, as this train in question was doing at the time or intending to do, the head brakeman opens the switch and the flagman or rear brakeman closes it. The head brakeman, of course, opens that switch before the train passes in. He rides on the engine. Then, as the train came along, the head brakeman would either get onto the engine and go to the opposite end of the train, or he would stand there and let the train pull by, and then walk down to the opposite end, unless they had some street crossing that is open. The flagman would close the switch after the rear end of the train passed the clearance point" (Rec., pp. 37-38).

A. J. Dant, petitioner's conductor, testified that he was in charge of the train and of the whole crew on the occasion of respondent's injury (Rec., p. 42). He testified that he and the respondent discovered the hot box on the train about four miles west of Xenia; that the train was not stopped after the discovery of the hot box until the stop was made to go into the passing track; that when the train stopped witness did not say anything to respondent; that respondent got down out of the cupola. Witness was looking out of the window to see what kind of stop they were going to make for the switch. After that he heard respondent "holler."

Witness testified that the engineer of the train, Charlie Schrum, was in court. There was a headlight on the locomotive, with the aid of which the engineer could see how close he was to the switch point. Witness was not able to determine positively, when the train stopped, how far the locomotive was back from the switch point, but he judged anywhere from a car length and a half to three cars. In the opinion of the witness the trestle was equal in length to a car. If the train had moved another car length further east the caboose would have cleared the trestle and there would have been a footing there for a man to get off the caboose.

Witness further stated that a hot box was one of the things they attempted to get fixed in order to prevent any further flaring up or any damage by fire, or anything of that kind, and also to prevent accidents, in the sense

that if something burns off or burns up a car may turn over, and things of that kind may occur; that it was the imperative duty of the flagman, or any other member of the crew, to attend to a hot box. Witness intended to have this hot box fixed after the train got into Xenia, after they got in onto this passing track (Rec., pp. 42-3). Witness did not know that the caboose had stopped on the trestle when it came to a stop.

SUMMARY OF ARGUMENT.

(1)

The question of petitioner's negligence was one for the jury. It was for the jury to say whether petitioner's conductor was negligent in ordering the respondent to alight from the train without first making any inquiry to determine whether the respondent could safely comply with the order.

Foster v. Mo. Pac. Ry. Co., 115 Mo. 165, l. c. 179;
Schulties v. United Rys. Co. (Mo. Sup.), 236 S. W. 54;
McCauley v. Anheuser-Busch B. Assn., 300 Mo. 638;
Bane v. Irwin, 172 Mo. 306;
Morgan v. Mo. Pac. Ry. Co., 136 Mo. App. 337;
Picket v. Quincy etc. R. Co., 156 Mo. App. 272;
Williams v. Terminal R. R. Assn. (Mo. App.), 20 S. W. (2d) 584, l. c. 586;
Mitchell v. C. & A. Ry. Co., 108 Mo. App. 142;
Sullivan v. Hines (Mo. App.), 218 S. W. 406;
Stuart v. Standard Oil Co., 211 Mo. App. 345;
Huskey v. Safety Boiler Co., 192 Mo. App. 370;
Atlantic Coast Line R. Co. v. Banks, 288 Fed. 826;
Schantz v. Northern Pac. R. Co., 42 N. D. 377, 173 N. W. 556;
Vandalia R. Co. v. Kendall, 68 Ind. App. 1, 119 N. E. 816;
Topore v. Boston & M. R. R., 78 N. H. 311, 100 Atl. 153;
Myers v. R. R., 166 N. C. 233;

Labatt, Master & Servant, Vol. III, Sec. 906, p. 2403.

(2)

Mr. Dant, the conductor of the train, was in charge of the crew. It was respondent's duty to obey his order "to get out and go ahead and fix the hot box" (Rec., p. 13). **The order was tantamount to an assurance that respondent could comply therewith in safety, and upon this assurance the respondent was entitled to rely.**

Keegan v. Kavanaugh et al., 62 Mo. 230;
Sullivan v. Hannibal & St. J. R. R., 107 Mo. 66, l. c. 78;
Herdler v. Range Co., 136 Mo. 3, l. c. 17;
Schantz v. Northern Pac. R. Co., 173 N. W. 556, 42 N. D. 377.

(3)

The duty rests upon the master, through his vice-principal, before issuing a command to the servant, to make proper inquiry to determine whether the order may, with reasonable safety, be executed by the servant.

Herdler v. Range Co., 136 Mo. 3, l. c. 17;
State ex rel. v. Ellison (Mo. Sup.), 223 S. W. 671;
Clark v. Iron & Fdy. Co., 234 Mo. 436, l. c. 448 et seq.

(4)

The fact that work is necessarily attended with some danger does not relieve the master from the duty to exer-

cise reasonable care, but emphasizes the importance and necessity of those having charge of the work proceeding carefully and cautiously, and under such circumstances, especially, is the master culpable if he causes the servant's injury by ordering him into a position of peril which the master could have discovered before giving the order.

Highfill v. City of Independence (Mo. Sup.), 189 S. W. 801;
Medley v. Mining Co., 207 S. W. 887.

(5)

Respondent did not assume the risk arising from the negligence of the conductor in ordering him to alight from the caboose at the trestle, because the dangerous position of the caboose was not known to respondent, nor was the danger so obvious that the Court could say, as a matter of law, that respondent must have known of it.

Westover v. Wabash Ry. Co., 6 S. W. (2) 843;
Doyle v. St. Louis M. B. T. Ry. Co. (Mo. Sup.), 31 S. W. 1010;
Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1;
Bane v. Irwin, 172 Mo. 306;
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310, 60 L. Ed. 1016;
C. R. I. & P. R. Co. v. Ward, 252 U. S. 18, 63 L. Ed. 430;
Gila Valley R. Co. v. Hall, 232 U. S. 94, 58 L. Ed. 521.

(6)

The Court could not say, as a matter of law, that respondent was guilty of negligence in complying with the conductor's order.

Burkhard v. Rope Co., 217 Mo. 466, l. c. 481;
Mooney v. Gasoline & Oil Co., 317 Mo. 1255, l. c. 1276;
Corby v. Telephone Co., 231 Mo. 417, l. c. 442;
Conroy v. Iron Works, 62 Mo. 35;
Kielty v. Const. Co., 121 Mo. App. 58, l. c. 64;
Carter v. Baldwin, 107 Mo. App. 217, l. c. 229.

(7)

Nor could the Court say, as a matter of law, that negligence on respondent's part, if there was such, caused the injury, solely and independently of the negligence of the conductor in ordering him to get off the car at a dangerous place.

45 U. S. C. 53;
Davis v. Dowling, 284 Fed. 670;
Union Pacific R. R. Co. v. Hadley, Admr., 246 U. S. 330;
Kamer v. M. K. & T. R. Co. (Mo. Sup.), 32 S. W. (2) 1075, l. c. 1079-1080.

(8)

In passing upon a demurrer to the evidence, it is the duty of the Court to accept as true all evidence in favor

of plaintiff and all inferences in plaintiff's favor which may, within any degree of propriety, be drawn therefrom, and the Court cannot draw inferences in favor of defendant to counterbalance or overthrow inferences in plaintiff's favor.

The Court can direct a verdict for defendant only when the evidence and the inferences to be drawn therefrom, considered in the light of the foregoing rule, show conclusively that plaintiff has no case.

Troll v. Drayage Co., 254 Mo. 332, l. c. 337;
Buesching v. Gas Light Co., 73 Mo. 219;
Gratiot v. R. R., 116 Mo., l. c. 466;
Scherer v. Bryant, 273 Mo., l. c. 602;
Steffens v. Fischer, 161 Mo. App. 386, l. c. 393;
Chicago G. W. R. Co. v. Healy, 86 Fed. 245, l. c. 248, and cases cited.

ARGUMENT.

The Question of Petitioner's Negligence Was One for the Jury.

The general rule governing the action of the trial court, in passing upon a demurrer to the evidence at the close of all the testimony, is well established. It is the duty of the Court to view the evidence in its light most favorable to plaintiff, conceding the truth of all evidence in the record tending to support plaintiff's case, and giving the plaintiff the benefit of every inference which can, within any degree of propriety, be drawn in his favor. All evidence in defendant's favor must be rejected, and the Court cannot draw inferences in defendant's favor to countervail or overthrow inferences supporting plaintiff's case. The rule applies with reference to all issues of fact in this case, including the issues of petitioner's negligence, respondent's contributory negligence and his alleged assumption of the risk. These rules are followed by the Federal Courts as well as by the Courts of Missouri, as the authorities which we have cited in our brief will show.

The conductor was guilty of negligence in ordering respondent to alight at a dangerous place.

We contend there was sufficient evidence to take the case to the jury on the issue of the negligence of petitioner, through its conductor, in ordering respondent, in

the nighttime, to alight from the caboose and go ahead and fix the hot box, when the caboose was stopped over a trestle.

It cannot be denied that petitioner's conductor, by the exercise of ordinary care, could have discovered that the caboose, at the time he ordered respondent to alight, was standing over the trestle. That respondent's safety, in complying with his order, would be and was imperiled is a self-evident fact.

The conductor of the train was in charge of the entire crew. He was respondent's superior, and it was respondent's duty to obey his orders. Such orders carry with them an assurance of safety, **upon which the servant is entitled to rely.** The rule is recognized in **Sullivan v. Railroad, 107 Mo. 63, l. c. 78,** where the Court said:

> "And having given the plaintiff the original assurance that the staging was safe, the fact that Prather was present and ordered and superintended the removal of the last section of the roof when the accident occurred was tantamount to a tacit assertion that it was safe for plaintiff to proceed with the removal of that section, and plaintiff was not bound to search for danger, but had a right to rely upon the judgment and discretion of the defendant's foreman that he would fully perform the measure of his duty towards him."

Similar statements of law have been repeated time and time again in master-and-servant cases.

In **Clark v. Iron & Foundry Co., 234 Mo. 436, l. c. 450,** the Court stated the rule was academic. We quote from the opinion:

> "It is equally academic that this duty of the master was imposed upon its vice-principal, Armstrong, the foreman in charge of the work, and whose orders appellant was obeying in ascending the pole and adjusting the guy ropes. And the foreman's order to the appellant to ascend the pole and do the work designated was an assurance that the place was reasonably safe for that purpose (Sullivan v. Railroad, 107 Mo., l. c. 78)."

And in **Bane v. Irwin, 172 Mo., l. c. 316,** the Court said:

> "The plaintiff did not assume the risk to which he was exposed by the negligent order of his foreman. The plaintiff's evidence tended to prove that the foreman had lighted the third shot but had told the plaintiff he had not done so; that plaintiff left the foreman in the immediate vicinity of the third shot, and that plaintiff had every reason to rely upon what Gibbs, the foreman, told him, and that the foreman, without waiting for the shot to explode, ordered plaintiff back into the dangerous place. As said by Judge Sherwood in Sullivan v. Railroad, 107 Mo., l. c. 78, * * * and plaintiff had a right to rely on the judgment of the foreman that he would perform his duty to him * * *."

The rule is not peculiar to Missouri. It is generally recognized. In **Schantz v. Northern Pacific Ry. Co., 42**

N. D. 377, 173 N. W. 556, suit was brought to recover damages for the death of a section man injured when attempting to board a moving freight train to return from his work, on the order of his foreman. The Court held that the negligence of the foreman, in directing or ordering deceased to board the moving train, was for the jury. In discussing this phase of the case the Court said:

> "It is one of the absolute duties of the master to exercise due care for the safety of his servants. Where it is necessary in the course of the conduct of the business of the master that orders be given to the servants concerning their conduct or the place where they are to work, or to go in pursuit of the master's business, the master has not only a right, but also the absolute power, to give such orders, and the servants have the right to assume that the master has exercised due care in so giving the same."

In **Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1,** which involved facts similar to the Schantz case, the Court said:

> "The servant does not stand on the same footing with the master. His primary duty is obedience; and, if when in the discharge of that duty he is damaged through the neglect of the master, it is proper that he should be recompensed. It is upon this inequality of position that it is held that a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the master has placed him, and is not bound at his peril to set his own judgment above that of his superior."

In the course of the discussion the Court makes the following significant remark:

> **"By giving a direct command to perform the work, the master takes upon himself the risk which otherwise would be assumed by the servant."**

It is equally well settled that the duty rests upon the master, through his vice-principal, before issuing a command to the servant, to make proper inquiry to determine whether the order may, with reasonable safety, be executed by the servant.

In the oft-cited case of **Herdler v. Buck's Stove & Range Co., 136 Mo. 3,** where plaintiff was injured by the collapse of a beam against which, at his foreman's order, he rested a ladder, the Court said (l. c. 17):

> "Defendant was bound to inspect and see that these posts were properly secured before ordering carpenters to go upon them."

In **State ex rel. City of St. Joseph v. Ellison et al., 223 S. W. 671,** the Court passed upon an opinion of the Kansas City Court of Appeals, affirming a judgment for plaintiff. The plaintiff went upon a pole at the order of his foreman, and the pole broke. The Court approved the opinion of the Court of Appeals, in which it was stated:

> "Under the foregoing circumstances, if the foreman failed to exercise ordinary care in ascertaining

whether the pole was or was not reasonably safe to be climbed, and ordered plaintiff to go up the pole and remove the wires, then there can be no doubt of defendant's liability. Clearly, whether plaintiff was or was not so ordered, was a question for the jury and not for us to decide. It was at most merely a question of veracity between plaintiff and the foreman."

That the master is liable for an injury resulting from a failure to use reasonable care with respect to orders and instructions given the servant in the course of the work is a proposition which is thoroughly established. The rule is stated in **Labatt on Master and Servant (2nd Ed.), Volume III, Section 906, page 2403,** as follows:

"The degree of care required of an employer in protecting his employes from injury is the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work.

"It may be stated that it is the duty that the law requires of the master to use all reasonable means and precautions against injuring a servant which ordinary prudence and foresight, in the light of the existing knowledge of conditions, dictates. This has reference, not only to a safe place in which to work and the kind of appliances furnished, **but as well to the requirements, demands and orders issued to servants from time to time in the process of the work."** (Emphasis ours.)

This rule was quoted and applied in **Huskey v. Boiler**

Company, 192 Mo. App. 370, l. c. 374, and we submit is a fair statement of the law of this state on the subject.

While the degree of care enjoined upon the master by this rule is ordinary care, the standard is one which adjusts itself to the circumstances. Where the situation is one in which danger lurks, the law requires of the master a higher degree of vigilance and foresight, with respect to orders issued to the servant, than in occupations where the danger of injury is slight. The law on this subject is forcefully stated in the case of **Highfill v. City of Independence, 189 S. W. 801.** In that case the servant was assisting in demolishing a building, an occupation attended by extreme danger, and to which the safe-place rule cannot be applied in its ordinary sense. The Court held the master liable for an order negligently given the servant, which resulted in the servant's injury, stating:

> "It is true, as contended by appellant, that the work in which the plaintiff was engaged was one of demolition of structure, and that, in such case, if the employe is injured as the result of a transitory danger which is necessarily incident to such employment, the employer is not liable; but in this case it appears that the plaintiff was not engaged in the performance of a mere isolated act without instructions as to his conduct, but was acting in pursuance of directions and upon appearances reasonably safe.
>
> "The rule in demolition cases does not relieve the employer of the duty to exercise ordinary care and caution for the safety of its employes; due consider-

ation being given to the peculiar circumstances and dangerous nature of the work and the impracticability of rendering it entirely safe.

"In demolishing structures the employer cannot heedlessly, and without caution on its part, proceed in the work. The very fact that such undertakings are accompanied by grave dangers only emphasizes the importance and necessity of those in charge of such work proceeding carefully and cautiously. When they give instructions to those who are to perform the work, and when the situation is such that the danger incident thereto is not reasonably apparent, **the servant is warranted in assuming that before such instructions were given the principal had made such investigation as the circumstances required**, and that the same, absent notice to the contrary, reasonably warranted the conclusion that the work, if done in an ordinary way and with the facilities provided for that purpose, could be done with safety.

"If those in control of a situation induce others to unknowingly assume a position of peril and injury results, and the peril was known or should have been known to the inducing party, law and humanity join in demanding for the injured one a just recompense." (Emphasis ours.)

When the servant is injured as a result of his compliance with an order of his superior the negligence of the superior, in issuing the order which results in such injury, is ordinarily a question for the jury. Such conclusion was

reached in the following cases involving facts analogous to the present case:

Foster v. Mo. Pac. Ry. Co., 115 Mo. 165: The plaintiff was ordered by defendant's roadmaster to board a construction train which was in motion, and while so doing was struck by a tie thrown from the car by the men upon it. This Court held that the question of the roadmaster's negligence, in ordering plaintiff to board the car, was one for the jury. In the course of the opinion it is said (l. c. 179):

> "As persons are legally chargeable with the natural and probable consequences of their acts, we consider that it was obviously proper, upon the evidence above outlined, to submit to the triers of fact the issue whether the foreman's order, as and when given, was or was not characterized by a want of ordinary and reasonable care for the safety of the plaintiff, and whether or not, if negligent, the order was the immediate cause of his injury."

In **Schulties v. United Rys. Co., 236 S. W. 54,** the Court held that plaintiff was entitled to recover for an injury received under the following circumstances: The plaintiff was employed in defendant's car shed as an assistant to its brake repair man, under whose orders he worked. Plaintiff and his superior boarded one of the cars for the purpose of moving it to another place. The repair man told plaintiff to put the trolley on, which plaintiff did.

After the car was started, and just as plaintiff was ready to go inside the car, and was standing on the step, the repair man called to him, "Grab the rope," referring to the trolley rope. Plaintiff turned around and grabbed for the rope, and was struck by a pole located close to the track. The Court held that the defendant was not guilty of negligence with reference to the location of the pole. It was further held that the repair man had implied authority to tell plaintiff to grab the trolley rope as he did, and that it was plaintiff's duty, under the circumstances, to obey the order, although there might not in fact have been any necessity for so doing. That if the order to grab the rope was given when the car was moving toward the post, and was within two or three feet of it, as plaintiff's evidence tended to show, then it was for the jury to say whether the order was negligently given, and whether it was the proximate cause of plaintiff's injury.

We have above called attention to the cases of:

Schantz v. Northern Pacific Ry. Co., 173 N. W. 556, 42 N. D. 377;
Vandalia R. Co. v. Kendall, 119 N. E. 816, 68 Ind. App. 1.

In each of the above cases the negligence of the master in ordering plaintiff to board a moving car was held to be a question for the jury.

In **Topore v. Boston & M. R. R., 100 Atl. 153, 78 N. H. 311,** it was held that where deceased, shoveling coal in a locomotive tender, was ordered to jump off, and was struck by a train moving in the opposite direction, whether such result should not have been anticipated by the boss was for the jury and raised a jury question as to the negligence of the boss.

We have cited other cases involving the same general consideration involved in the present case, under point (1) of our brief. They illustrate the various circumstances under which the courts have declared that the question of negligence on the part of a foreman or other superior, in issuing a command to an inferior servant, is a matter for the jury.

In the cases above reviewed (and others cited in our brief), where injuries have befallen employes as a result of a foreman's order to board or alight from a moving car, the considerations involved in determining whether the foreman's order was in fact a negligent one are largely the same as those involved in the present case. Whether a train is moving too rapidly for the employe to board or alight in safety, or whether there are other dangers, such as approaching trains, obstructions beside the track (or a pitfall, as in this case), which may cause injury to the servant, are matters which the foreman should take into consideration before issuing the order. In the various cases we have cited, the opportunity of the foreman to

discover the existing danger before issuing the order was no greater than the opportunity of the conductor, in the present case, to discover that the caboose was on the trestle. It will be conceded that, if the conductor had exercised ordinary care to do so, he could have discovered, before telling respondent to alight, that the caboose was on the trestle.

Petitioner contends that respondent should have remained on the caboose until the train was pulled into the siding. This contention is of no avail against respondent, since he was acting pursuant to an order of his superior; it does greatly emphasize, however, the fact that the conductor was negligent in ordering respondent to alight at the time he did. If good railroading and ordinary prudence demanded that the repairs to the hot box be postponed until the train had pulled up on the siding, then the conductor was plainly guilty of negligence in giving respondent the premature order shown by the evidence.

It is contended that the respondent in this case had an equal opportunity, with the conductor, to discover the location of the caboose. The same observation would apply in most of the cases where the injury resulted from an order to board or alight from a moving train. Such course of reasoning erroneously denies any effect to the master's order and remits the servant to the same legal position he would occupy if no order had been given.

In the present case it was the conductor's positive duty not to order respondent to alight from the caboose at a

place where compliance with the order would subject respondent to danger of injury. The obligation to inquire if the order could be safely executed rested upon the conductor, not on the respondent. **Obviously, the respondent could not know, when the conductor ordered him to alight, whether the conductor had performed this duty or not.** The respondent had the clear legal right to rely upon the assurance of safety, implied by the conductor's order, and to assume that the conductor had made such observation as was necessary before issuing the order.

We respectfully submit that the negligence of the conductor, in giving respondent this order without first making proper inquiry as to the circumstances, was clearly an act of negligence for which the petitioner should be required to respond.

Respondent Did Not Assume the Risk.

It is claimed that the respondent assumed the risk, under the federal rule, notwithstanding the fact that he was acting pursuant to the order of his superior, and did not know that the caboose was standing on the trestle.

A somewhat similar situation was before the Court in **Westover v. Wabash Ry. Co., 6 S. W. (2) 843**, where the plaintiff, a switchman, while standing on the steps of an engine tender, was struck by a switch stand located about four feet from the track. The crew of which

plaintiff was a member frequently ran through the yard where the accident occurred, and the stand by which he was struck was plainly visible to him on such trips. It was calculated to attract attention, because there was but one other like it in this yard. The Court held that, although plaintiff assumed the ordinary risks and hazards incident to his employment, and also risks caused by his employer's negligence, if the facts were fully known to him, or so plainly observable that they would be presumed to be known to him, **he was not obliged to use even ordinary care to discover dangers resulting from his employer's negligence.** Whether the nearness of the switch stand to the track, and the danger inherent to the situation, would inevitably have disclosed themselves to a person in plaintiff's situation, was held to be a question for the jury.

Under the law of assumption of risk, as declared by the United States Supreme Court, the servant is absolved completely from any duty to look for, or anticipate danger from, the negligence of the master. He may confidently rely upon the exercise of ordinary care by the master, and, when the master fails in this duty, the assumption-of-risk doctrine comes into play only after the servant has actual knowledge of the facts or situation from which the danger arises, unless the condition from which the danger arises is obvious.

In **Chesapeake & Ohio R. Co. v. De Atley, 241 U. S. 314, 60 L. Ed. 1016,** the plaintiff, a brakeman, was injured

while attempting to board the engine of a train which was moving directly toward him at the speed of twelve miles per hour. The case was submitted to the jury under instructions making defendant's liability depend upon whether the engineer, with knowledge of plaintiff's purpose to board the train, negligently operated it at a rate of speed so as to make plaintiff's attempt to board it unusually hazardous. There was a verdict for plaintiff. The case went on writ of error to the United States Supreme Court, where the chief question involved was the alleged assumption of risk by plaintiff. The Supreme Court held that plaintiff assumed the risk normally incident to boarding a moving train, but not any risk which might arise from the failure of the engineer to operate the train with due care and at a moderate rate of speed; that plaintiff had the right to presume that the train would be operated at a moderate rate of speed "until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other." The Court, in its opinion, stated:

> "It is insisted that the true test is not whether the employe did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with

the rule repeatedly laid down and uniformly adhered to by this Court. **According to our decisions, the settled rule is not that it is the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.''**

In the foregoing case this Court held that an employe, in broad daylight, who, without any order from any superior, stood beside a track with the intention of boarding an approaching locomotive which was in plain view, and which he was watching, had the right to presume that the engineer would exercise ordinary care for his safety by operating the locomotive at a moderate rate of speed in order to enable him safely to board it, and that the employe was not chargeable, as a matter of law, with knowledge of the fact that the locomotive was being operated at a rate of speed which was unusually high and dangerous. We contend that the respondent in this case had the same right to rely upon the exercise of ordinary care by the petitioner's conductor in issuing the order which resulted in respondent's injury, and was not charge-

able, as a matter of law, with knowledge of the fact that the caboose was on the trestle.

It is not claimed in this case that respondent actually knew that the caboose was stopped upon the trestle when he was ordered to get off. He did not discover that fact before he fell. He was not required to anticipate that the conductor was sending him into danger by a premature and improvident order, and cannot be held, under the controlling authorities, to have assumed the risk arising from such negligence. He would have assumed the risk only if the evidence showed that he had actually discovered the position of the caboose before he fell, or if under all the circumstances the conclusion was inevitable that he must have known of it. No such conclusion can be drawn in this case, for it is obvious that if respondent had known that the caboose was upon the trestle, he would not have alighted from it.

The Injury Was Not Due to Negligence, Sole or Contributory, on Respondent's Part.

The question of negligence on respondent's part is also raised in petitioner's brief. Under the Federal Employers' Liability Act (45 U. S. C. 53), contributory negligence on respondent's part would not defeat his action, but would go merely to diminish his damages.

The contention is made that respondent's fall was due solely to negligence on his part. We deny that he was guilty of negligence, as a matter of law, and also deny

that his injury was caused solely by his own acts, whether they be considered negligent or not.

The negligence of a servant, who is injured in complying with an order of the master, is a question for the jury, unless, in complying with the order, the servant incurs a danger which is both **obvious** and **imminent**. In the present case the danger was not obvious, because of the darkness. In getting off the caboose, holding his lantern before him, moving from the light into the darkness, respondent's lantern necessarily created a curtain of light below him, which prevented him from discovering that he was not alighting on the surface. Under such circumstances the question of his negligence was one for the jury (Authorities, Point [6] supra).

Even if we conceded that respondent was negligent, as a matter of law (which we by no means do),—by what process could the Court say that his negligence was the sole cause of his injury, so as to defeat his action under the Federal Employers' Liability Act? The Court could not rightfully exclude from consideration the conductor's negligent order, which bore the clearest causal relation to the act of respondent in alighting at the time and place he did. If respondent was negligent in alighting from the caboose at a dangerous place, the conductor was equally negligent in ordering him to alight at a dangerous place.

It is quite obvious that the trial court could not have sustained the petitioner's demurrer on the theory that re-

spondent was guilty of negligence, as a matter of law, and that such negligence was the sole cause of his injury. We have cited the applicable authorities in our brief.

We respectfully submit that the petition should be denied.

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JOHN S. MARSALEK,
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SUPREME COURT OF THE UNITED STATES.

No. 703.—October Term, 1931.

The Baltimore & Ohio Railroad Company, Petitioner,
vs.
Ray Berry.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[May 16, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, — U. S. —, to review a judgment of the Supreme Court of Missouri, — Mo. —, 43 S. W. (2d) 782, sustaining a recovery by respondent in the Circuit Court of the City of St. Louis, under the Federal Employers' Liability Act. Respondent, who was employed by petitioner in interstate commerce as a flagman or rear brakeman on a freight train proceeding over its line from Illinois to Indiana, was injured by a fall when attempting to alight in the night-time from a caboose, which was standing on a bridge or trestle, so narrow as to afford no foothold to one getting off the train at that point. The state supreme court held that the trial court rightly overruled petitioner's demurrer to the evidence and correctly submitted to the jury the question of the petitioner's negligence, by its agents and servants, in ordering or permitting the plaintiff to alight from the caboose where it was dangerous to do so.

Respondent, an experienced railway brakeman, had been in the employ of the petitioner in that capacity for about nine years. For a number of years his regular run had been over petitioner's line where he was injured. The testimony was sharply conflicting, but the jury, if it believed the testimony most favorable to the respondent, could have found the following facts. The respondent was one of a crew of five men on a train consisting of engine, tender, forty-two cars and caboose, proceeding easterly in the direction of Xenia, Illinois. He was serving as rear brakeman and rode in the caboose with the conductor. The train was under orders, known to the crew, including the respondent, to enter a

passing track at Xenia and wait there until it was passed by another train going west. About three miles west of Xenia, respondent and the conductor observed a blazing hot box on one of the cars; the train was stopped on the main line, and both went forward to examine the hot box. The conductor then sent respondent to the engine to get a bucket of water to put out the fire, instructing him to say to the engineer that at the next stop, at Xenia, they would finish any necessary work on the box. Respondent communicated this message to the engineer; the fire was extinguished and the train proceeded on its way until it halted at Xenia. The stop there was made for the purpose of opening the switch, so that the train could enter the passing track, with the engine from one and one-half to three car lengths from the switch, and the caboose, at the rear end of the train, standing on the trestle. The respondent testified that he and the conductor were in the cupola of the caboose when it stopped and that the conductor then said: "Get out and go ahead and fix the hot box"; that he knew at the time that the train was not on the passing track; that he immediately took his lantern, walked down the caboose steps, from which he stepped into space and fell into the ravine which was spanned by the trestle.

The state supreme court held that under the instructions given by the trial court, the jury, in order to return a verdict for respondent, was required to find that the petitioner was negligent both in stopping the caboose on the trestle and in directing or permitting the respondent to alight there. It held, rightly, that there was no evidence that the petitioner was negligent in stopping the train where it did, but as it concluded that petitioner negligently directed or permitted respondent to alight at that point, it upheld the verdict as necessarily involving a finding of such negligence on the part of the conductor.

There was no evidence that either the conductor or respondent knew that the caboose had stopped on the trestle and, as they were together in the cupola of the caboose when the train stopped, their opportunity for knowledge, as each knew, was the same. Hence, there is no room for inference that the conductor was under a duty to warn of danger known to him and not to the respondent, or that respondent relied or had reason to rely on the conductor to give such warning. Nor was the request to alight a command to do so regardless of any danger reasonably discoverable by re-

spondent. The conductor did not ask respondent to alight from the caboose rather than from one of the forward cars standing clear of the trestle, where it was safe, or to omit the precautions which a reasonable man would take to ascertain, by inspection, whether he could safely alight at the point chosen. There was no evidence that the respondent could not have discovered the danger by use of his lantern or by other reasonable precautions, or that he in fact made any effort to ascertain whether the place was one where he could safely alight.

The state supreme court thought that it was the duty of the conductor to ascertain, by inspection, whether respondent could alight with safety, and to give warning of the danger if he could not. But there was no evidence of any rule or practice, nor do we know of any, from which such a duty could be inferred. The conductor could have no knowledge of such danger, nor was he in a position to gain knowledge, superior to that of other trainmen, whose duty it was to use reasonable care to ascertain, each for himself, whether, in doing his work, he was exposing himself to peril. A duty which would require the conductor, whenever the train was stopped and trainmen were required to alight, to inspect the place and warn of danger where each might get off the train, would be impossible of performance.

There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where he alighted or to warn him of the danger. If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.